Supreme Court, U.S.
FILED
AUG 25 1971
E. ROBERT SEAVER, CLERK

In The

# SUPREME COURT OF THE UNITED STATES

No. 71-280

DONALD DAVIS, JR., a Minor by his Mother and Next Friend, Mrs. Sadie Davis, et al,
Respondents,

vs.

SCHOOL DISTRICT OF THE CITY OF PONTIAC, INC., et al,
Petitioners.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

## TABLE OF CONTENTS


| | Page |
|---|---|
| PROCEEDINGS BELOW | 1 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 2 |
| I. WHAT IS SEGREGATION? | 2 |
| II. DID THE COURT OF APPEALS ERR IN ITS FAILURE TO ANALYZE THE PREMISE UPON WHICH THE TRIAL COURT'S JUDGMENT WAS BASED — VIZ., FAILURE OF A SCHOOL SYSTEM TO COUNTERACT RESIDENTIAL HOUSING PATTERNS CONSTITUTES INTENTIONAL SEGREGATION? | 2 |
| THE FACTS | 2 |
| SUMMARY OF FACTS | 18 |
| REASONS TO GRANT PETITION | 19 |
| SUMMARY | 37 |


### APPENDIX


| | |
|---|---|
| Note on DeJure Segregation | 39 |
| *Davis* v. *School District of City of Pontiac,* (6th Cir. 1971) | 48 |
| *Davis* v. *School District of City of Pontiac,* (E.D. Mich., 1970) 309 F. Supp. 743 | 59 |
| *Henry* v. *Godsell,* 165 F. Supp. 87 (E.D.Mich., 1958) | 80 |
| *Deal* v. *Cincinnati Board of Educqtion,* (6th Cir., 1969) 419 F. 2d 1387 | 88 |
| *Deal* v. *Cincinnati Board of Education,* (6th Cir. 1966) 369 F. 2d 55 | 115 |
| *Deal* v. *Cincinnati Board of Education,* (SD Ohio 1965) 244 F. Supp. 572 | 132 |
| *Bell* v. *School City of Gary, Indiana,* (7th Cir. 1963) 324 F. 2d 209 | 152 |
| *Downs* v. *Board of Education of Kansas City,* (10th Cir. 1964) 336 F. 2d 988 | 161 |

## TABLE OF CASES

Page

*Banks* v. *Muncie Community Schools*, 433 F. 2d 292 (7th Cir. 1970) ..... 29

*Bell* v. *School City of Gary, Indiana*, 324 F. 2d 209 (7th Cir. 1963) cert. den. 377 U.S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216 ..... 20, 29

*Broussard* v. *Houston*, 262 F. Supp. 266, 270 (1966), aff'd 395 F. 2d 817 (5th Cir. 1968) ..... 30

*Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 ALR 2d 1180 (1954) ..... 19

*Clemons* v. *The Board of Education of Hillsboro, Ohio*, 228 F. 2d 853, cert. den. 350 U.S. 1006, (6th Cir. 1956) ..... 19

*Deal* v. *Board of Education*, 369 F. 2d 55, (6th Cir. 1966) ..... 3, 5

*Deal* v. *Board of Education*, 419 F. 2d 1387 (6th Cir. 1969) cert. den. 91 S. Ct. 1630 ..... 20, 29

*Dowell* v. *Board of Education*, 375 F. 2d 158, 166 (6th Cir. 1967), cert. den. 387 U.S. 931 ..... 30

*Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (10th Cir. 1964) cert. den. 380 U.S. 914 ..... 20, 29

*Griggs* v. *Cook*, 272 F. Supp. 163, 169 (1967), aff'd 384 F. 2d 705 (5th Cir. 1967) ..... 30

*Henry* v. *Godsell, et al.*, 165 F. Supp. 87 (E.D. Mich. 1958) ..... 20, 21, 22, 29, 32, 37

*Kelley* v. *Everglades Drainage District*, 319 U.S. 419, 420, 63 S. Ct. 1141, 87 L. Ed. 1485 (1943) ..... 35

*Northcross* v. *Board of Education*, 397 U.S. 232 (1970) ..... 24

*Offerman* v. *Nitkowski*, 378 F. 2d 22, 24 (1967) ..... 30

*Olson* v. *Board of Education*, 250 F. Supp. 1000, 1006 (1966), aff'd 367 F. 2d 565 ..... 29

*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5-6, 28 L. Ed. 2d 554, 560-561 (1971) ..... 20, 29, 31, 36

Page

*Webb* v. *Board of Education*, 223 F. Supp. 466, 468 (1963) ..... 29

*Workman* v. *Board of Education of Detroit*, 18 Mich. 400, 409-410 (1869) ..... 3

## TABLE OF OTHER AUTHORITIES

Bloomfield, Neil Jon: "Equality of Educational Opportunity: Judicial Supervision of Public Education," 43 S. Calif. L. Rev. 275, 298 ..... 24, 31

Carroll, L.: *Through the Looking Glass*, 124 (1875) ..... 37

Freund, Paul A.: "Civil Rights and the Limits of Law," 14 Buffalo L. Rev. 199 (1964) ..... 36

35 G. Wash. L. Rev. 701 (1967) ..... 30

81 Harv. L. Rev. 698-99, 1512 (1968) ..... 30

82 Harv. L. Rev. 1185 (1969) ..... 30

83 Harv. L. Rev. 1439, N. 34 (1970) ..... 30

53 Ia. L. Rev. 1184-85 (1968) ..... 30

Michigan Constitution, Article 8, Sec. 2 ..... 3

Michigan Legislature, Michigan Session Laws, 1967, Vol. I, p. 43 ..... 2

Mich. Stat. Ann. 15.3355 ..... 3

Mich. Stat. Ann. 15.3589 ..... 23

41 N. Dak. L. Rev. 347, 351-352 (1965) ..... 30

Public Act, 1955, No. 269 C.L. 340.355 ..... 3

Rule 52 (a), Rules of Civil Procedure ..... 35, 37

Taeuber, Carl E. and Alma F.: Negroes in Cities, Chicago: Aldine (1965) pp. 22-23, 32-34, 29-30, 25-28 ..... 12, 25, 28, 34

Title 28 USC, Sec. 1254 ..... 2

Title 28 United States Code, Sec. 1331 and 1343 (3) (4) ..... 2

Title 28 USC, Sec. 2201 and 2202 ..... 2

Title 42, USC, 1981 and 1983 ..... 2

73 W. Va. L. Rev. 1 (1970-71) ..... 24

79 Yale L. J. 669 (1970) ..... 30

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vs.

SCHOOL DISTRICT OF THE CITY OF PONTIAC, INC., et al,
Petitioners.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

### PROCEEDINGS BELOW

This petition for writ of certiorari is filed in order to obtain a review of *Donald Davis, Jr., a Minor by his Mother and Next Friend, Mrs. Sadie Davis, et al* v. *School District of the City of Pontiac, Inc., et al,* decided by the United States Court of Appeals for the Sixth Circuit and unreported at this date. The case originated in the United States District Court, Eastern District of Michigan, Southern Division. The District Court's opinion is reported in 309 F. Supp. 734.

The trial court has ordered an elaborate plan of cross bussing of pupils in the Pontiac Public Schools.[1] The plan is intended to produce a racial balance in every public school.

### JURISDICTION

The order sought to be reviewed was entered on the 28th day of May, 1971 by the United States Court of Ap-

peals for the Sixth Circuit. The case involves the question of whether or not the petitioners have violated the constitutional rights of the respondents. This action originated through a complaint filed pursuant to Title 28, United States Code, Sec. 1331 and 1343 (3) (4). It was an equitable action pursuant to Title 42 USC, 1981 and 1983 and a declaratory judgment action pursuant to 28 USC, Sec. 2201 and 2202. The case involves questions of interpretation of the Constitution of the United States.

The Supreme Court has jurisdiction to review a case of this sort under Title 28 USC, Sec. 1254.

## QUESTIONS PRESENTED

I. WHAT IS SEGREGATION?

II. DID THE COURT OF APPEALS ERR IN ITS FAILURE TO ANALYZE THE PREMISE UPON WHICH THE TRIAL COURT'S JUDGMENT WAS BASED – VIZ., FAILURE OF A SCHOOL SYSTEM TO COUNTERACT RESIDENTIAL HOUSING PATTERNS CONSTITUTES INTENTIONAL SEGREGATION?

## THE FACTS

Public schools in the State of Michigan have been integrated since 1867. In that year the Michigan Legislature amended the school laws to provide:

> All residents of any district shall have an equal right to attend any school therein, provided that this shall not prevent the grading of schools according to intellectual progress of the pupils, to be taught in separate places when deemed expedient. Michigan Session Laws 1867, Vol. I, page 43.

The foregoing statute has been interpreted by the Michigan Supreme Court, as follows:

> It cannot be seriously urged that with this provision enforced, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race, or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established. *Workman v. Board of Education of Detroit*, 18 Mich. 400, 409-410 (1869).

A similar provision exists in the current school code, as follows:

> No separate school or department shall be kept for any person or persons on account of race or color. This section shall not be construed to prevent grading of schools according to the intellectual progress of the pupil, to be taught in separate places as they may be deemed expedient. Public Act, 1955, No. 269; C.L. 340.355; Mich. Stat. Ann. 15.3355.

A similar prohibition is contained in the Michigan Constitution, Article 8, Section 2:

> The Legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

There is the absence of any evidence of any rule, regulation, policy or practice to assign pupils to schools on the basis of race. Consistently, it had been the policy and practice of the Pontiac Public Schools to assign pupils in such a way that they "shall attend the school which serves the attendance area in which they live, irrespective of race,

color, nationality, or religious affiliation." (Defendants' Exhibit 4, App. 922, 925; trial court's opinion, *infra*, pp. 60-61.)

It was not until 1964 that the Board of Education of Pontiac agreed to take race into consideration and adopted the following policy (Defendants' Exhibit 6, App. 929).

> Under our system of laws, it is the primary responsibility of each community to provide equal educational opportunities for all children in terms of quality instruction, adequacy of facilities, and instructional materials, and opportunity for personal fulfillments. The latter can be accomplished to an adequate degree in our democracy only when the policies and practices of the school system place a positive emphasis upon achieving and maintaining a racially integrated school system. Providing this equity in educational opportunities is a part of the process of educational planning, done by cooperative means consistent with the basic educational philosophy of our school district.
>
> **Pupil Placement**
>
> Pupil placement practices of the school district must be based on sound education principles, and should provide integrated school populations insofar as this is possible.
>
> The neighborhood school concept is believed to represent sound educational practice. Pupils will be guaranteed the right to attend the school which serves their attendance area as established by action of the Board of Education. The Board of Education recognizes that circumstances arise occasionally wherein shifts in population necessitate the temporary provision of special housing arrangements for pupils.
>
> These may occur in the future, but do not negate the broad principle enunciated here.
>
> The present school attendance areas have been established on the basis of the following criteria: *the near-*

*ness of pupils to school, the safety of pupil access routes to school, and the reasonable capacity of the school.* At such times as changes in school attendance areas may be required, an additional criterion will be observed. *When possible, the boundaries shall be drawn so as to provide integrated student bodies in schools.* This added criterion will also receive consideration along with other criteria in the selection of sites for the location of new schools.[1] (emphasis added)

**Employment and Assignment of Teachers**

It is the continuing policy of the Board of Education to employ, upgrade, and assign all applicants for ad-

[1] It is to be noted that the portion of the Pontiac policy which relates to the assignment of pupils to schools, while different in phraseology, is similar in effect to the policy of the Cincinnati Public Schools which has been reviewed and approved by the United States Court of Appeals for the Sixth Circuit. See *Deal* v. *Board of Education*, 369 F. 2d 55, 57-58, n. 1 (1966). The Cincinnati policy contained in the Sixth Circuit opinion is:

"1. On March 9, 1964, after the commencement of the present action, the Board of Education adopted the following policy statement to guide its officers and employees:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R. C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Section 3313.48, and the numerous factors which have always been considered in establishing such zone lines as — safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

ministrative, teaching, secretarial, clerical, maintenance, and all other positions within the table of organizations on merit without regard to race, color, marital status, nationality, or religion.

The Board of Education believes it to be desirable that all school pupils should have the opportunity to receive instruction from white and Negro teachers during their years in school. Thus, it is desirable to achieve and maintain an equitable distribution of Negro and white teachers in the various schools of the school district.[2]

Teachers are professional persons and have the right to have their views on their placement and assignment considered and respected. Furthermore, it is sound educational practice to assess the specific qualifications of each teacher and specific needs of each position and, to the degree possible, to match the qualifications of the employee to the needs of the position.

It is believed that an equitable distribution of white and Negro teachers, respect for the views of teachers with regard to assignments, and matching professional qualifications with the needs of each position can and should be achieved through appropriate in-service education, encouragement, and administrative effort.[3]

---

[2] Every faculty in the Pontiac Public School System has both black and white teachers on it, even though the percentage of Negro teachers is greater in schools that are predominantly Negro than it is in schools that are predominantly white [Defendants' Exhibits 11 and 12, App. 935-936; Louis Crew, direct testimony, App. 367 (T. 419-420)].

[3] Mr. Louis Crew, Director of Instructional and Non-Instructional Personnel, Pontiac Public Schools, testified at great length about the effort the Pontiac Public Schools have expended to expand the recruitment of Negro teachers and to arrange for cooperation between the public school system and teachers in the transfer of teachers from one school to another in order to bring about faculties that have both Negro and white teachers in every school. [Louis Crew, direct testimony, App. 312-378 (T. 354-433)].

**Educational Program**

It is the continuing policy of the Board of Education that educational programs of excellence must be provided for all pupils in all schools. Where special educational needs are found to exist, special educational programs and services will be provided to meet these.

Text books, instructional materials, and instructional programs should be examined in light of their adequacy with respect to the role and contribution of the Negro in American development, the effect of slavery and discrimination of Negroes as individuals and a group, and the implication of the Civil Rights Movement. These emphases are essential elements in the instructional program if good inter-group attitudes and understandings are to be developed among all children, and if the Negro child is to develop a good self-image, proud of his race and heritage, and a sense of equality as a human being.

**School Facilities**

It is the continuing policy of the Board of Education to provide the best possible school facilities for all schools and all pupils.

It is apparent both from the law of Michigan and from the long-standing policy of the Pontiac Public Schools to operate a neighborhood school system on a "color-blind" basis, which later evolved into a "color conscious" basis for the purpose of stimulating interracial experiences that this is a case where there is no statute, rule, regulation, practice or policy that has brought about racial imbalance in the public schools of Pontiac, Michigan.

The trial court has held that the failure of the Pontiac Public Schools to effectively balance the races constitutes *de jure* segregation:

> When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission * * * (Trial Court's opinion, *infra*, p. 72).

In support of the foregoing conclusion, the court made a finding that —

> * * * the Pontiac Board of Education intentionally utilized the power at their disposal to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation within the City and thereby, deliberately, in contradiction of their announced policies of achieving a racial mixture in the schools, prevented integration. (Trial Court's opinion, *infra*, p. 72.)

In eighteen separate instances, the trial court refers to the *failure to act* on the part of the Pontiac Public Schools. In each of these instances the Board's failure to act is cited as an example of how racial balance could have been promoted but for the Board's failure to act.

An example of the failure to act, cited by the trial court, is:

> Yet, the testimony clearly reveals that in 1954 when boundary lines were first drawn designating school attendance zones, *the only criteria employed in determining the zones was nearness of school, safety of access routes and capacity.* Despite any pronouncements or resolutions adopted, the testimony clearly reflects that Board of Education *never* considered achievement of racial balance as a factor in setting the original boundaries. (Trial Court's opinion, *infra*, p. 67) (emphasis added).

As noted above, the Pontiac Public Schools operated a neighborhood school policy on a "color-blind" basis up

until 1964; consequently, it is not inconsistent that the school attendance boundary lines that were drawn in 1954 were drawn without regard to race.

Another example of the court's indication of a failure to act on the part of the Pontiac Public Schools is:

> In addition, between the period of 1955 and 1964 nine new schools were also built without any consideration given toward achieving a racial mixture. The Board admits that schools were located in accord with housing development and, thereby, readily adopted the same segregated pattern; with the addition of each new school, segregation advanced – it became fixed and cemented. (Trial Court's opinion, *infra*, p. 68.)

Not even the plaintiffs, in their complaint, allege anything other than a charge of *de facto* segregation:

> Plaintiffs contend that the elementary, secondary and high schools within the City of Pontiac operate under a system of *de facto* segregation which has resulted from defendants' policy of shifting boundary lines and locating new schools in such a manner as to minimize the prospect of achieving maximum integrated schools. (Trial Court's opinion, *infra*, p. 60; Complaint, Count I, App. 3-8.)

**Attendance Zone Boundary Lines**

Pontiac Public Schools service the residents of approximately 39 square miles with 37 schools. Negroes attend all but six of these schools [App. 568 (T. 655)].

Prior to 1954 attendance areas were informally administered by principals. Each attendance area was indicated by a circle drawn around the school. The border areas were resolved by agreement between the appropriate principals and parents involved. In 1954 the school board directed "specific boundaries shall be established for each

school in the Pontiac School District. School pupils shall attend the school serving the school district in which they live, except that special pupil transfers from one school district to another may be granted when extenuating circumstances exist." [Defendants' Exhibit 2, App. 914, 917; App. 198 (T. 218-219)].

The reasons for special transfers include special educational services and facilities that are available at schools other than the school of pupil's residence; mental, emotional, physical health of child; and mid-year transfers (if there are less than 10 weeks left in the year the pupil could remain in his old school). In addition, a junior high school student who has completed the 7th and 8th grades may stay in his junior high school even though his family moves.

The attendance zone boundary lines that were drawn in 1954 were based upon nearness to the school, capacity of the school building and safety of access routes. New school sites have been consistently selected prior to 1964 on the basis of accessibility of these facilities to the children to be served irrespective of their race, color or creed [Defendants' Exhibit 3, App. 919, 920; App. 200 (T. 221)].

The school attendance zone boundary lines have been modified from time to time since 1954. The original boundary lines are shown on Defendants' Exhibit 1, App. 903-913; App. 201; T. 222-223, by black lines surrounding each school. Modifications have been made in some school attendance boundary lines from time to time, for the purpose of relieving overcrowding and to make adjustments necessitated when new schools are constructed. (Modifications are shown with red lines.)

The several changes in the school attendance zone boundary lines are set forth in Defendants' Exhibit 1, App. 903-913. Each of these boundary lines is discussed in detail in the testimony of William J. Lacy, who is the

assistant superintendent for instruction and school organization of the Pontiac Public Schools and who has been responsible for the school attendance boundary lines for a number of years [App. 201-227 (T. 222-253)]. In each case where the attendance zone boundary lines were changed, the change was brought about by overcrowding of schools, movement of people into the neighborhood, or new real estate development which brought new families and necessitated construction of new schools. In each case prior to 1964 the attendance zone boundary lines were based upon criteria of school capacity, proximity of the pupils to the school and safety of the route of movement between home to school. After 1964 the additional criteria of reducing racial imbalance where it was possible without violating the first three criteria was added, and followed.

The result of this application of the neighborhood school policy has been that the racial makeup of the pupil population of each school reflects the racial makeup of the neighborhood that it serves. Some schools are all white, some schools are all Negro, still other schools have a combination of white and Negro pupils in varying percentages ranging from 97.96% to 2.13% Negro, and including a number of schools that have such a good representation of both races that they could be considered more or less racially balanced. Negroes attend all but six schools [App. 568 (T. 655)]. The racial composition of each school merely reflects the racial composition of the neighborhood it serves.

The record does not contain a scintilla of evidence of any school attendance zone boundary line that was established or altered or any school site selected for the purpose of segregating pupils on the basis of race or on the basis of any other arbitrary classification.

Any student may attend any public school be it an all-white or all-Negro, or racially balanced school if he lives

in the attendance zone served by the school. The residential housing patterns in the area served by the Pontiac Public Schools are such that Negroes tend to live in neighborhoods with other Negroes and whites tend to live in neighborhoods with other whites; however, in some neighborhoods both whites and Negroes live together.[4]

Since 1951 the population in the southeastern portion of the city, lying south of Auburn Avenue and east of Saginaw Street, has shifted from a predominantly white area to a predominantly black area. During this period of transition the schools in this area at various times had racially balanced pupil populations; however, after the period of change had been completed the schools became predominantly black [Defendants' Exhibit 19, App. 1004; Dana Whitmer, direct testimony, App. 561-566 (T. 646-653)]. In each instance the change in the racial composition of pupil population in these schools was brought about by the mobility of the pupils and of their families, not by either malicious or by innocent tampering with the school attendance zone boundary lines.

Pontiac has been characterized by a great geographic mobility among Negroes. This is illustrated in Defendants' Exhibit 19, App. 1004 and is discussed in some length by Superintendent Whitmer [App. 560-566 (T. 646-653)]. A number of schools were all white but then became racially balanced and then became predominantly Negro. For example, Area 2 shown on Defendants' Exhibit 19, App. 1004, was predominantly white. In 1957,

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[4] "For most Negroes, to live near family and friends is to live near other Negroes; on a mass basis this will produce a high degree of residential segregation. Residential segregation may have other voluntary aspects. It is sometimes argued by both Negroes and whites that Negroes enjoy a greater measure of freedom in Negro areas where they need not be concerned about getting along in the face of continued slights and discriminatory acts." Carl E. Taeuber and Alma F. Taeuber: *Negroes in Cities*, Chicago: Aldine (1965) pp. 22-23.

19.4% of the pupils from this area were Negro and 80.6% were white. By 1968 the color combination had drastically changed; 65% of the pupil population was Negro and 35% of the pupil population was white. This drastically changed the racial composition of a number of schools that served the area shown on Defendants' Exhibit 19 as Area 2 [App. 562-563 (T. 648-650)].

In connection with this movement there has been an increased dispersal of Negroes throughout Pontiac. Superintendent Whitmer testified:

> Well, there has been an increase in the dispersal of Negro students throughout the school district and it shows up in two ways: One, in 1957, there were thirty-one schools at that time in the school district; fourteen of them were all-white schools. In 1969, there are thirty-seven schools in the school district and only six are all-white schools. So that there has been a decrease in the number and percent of all-white schools, which is one way of indicating a dispersal of black students throughout the school district.
>
> There is a second way, too: That in 1957, about eighty percent of the Negro students were in schools that were predominantly Negro. Now, I define predominantly Negro for this illustration by saying more than fifty percent of the school population was Negro. More than eighty percent of the Negro students attended schools that were predominantly Negro in that definition.
>
> In 1969, the percentage of students, Negro students, attending predominantly Negro schools, using the same definition, had dropped to a little less than sixty percent, which, again, shows a dispersal trend that has been taking place in the School District for the City of Pontiac.
>
> Whereas there are more Negro students in '69 than there were in '57, the dispersal of these students or the percentage of these that are in the schools through-

out the school district has increased substantially. [App. 568-569 (T. 655-656)].

In addition to the heavy mobility of Negroes within the school system there has been a heavy immigration of Negro families into the Pontiac School District. Between 1957 and 1969 the Negro enrollment rose from 3,206 to 7,485 while during the same period the white student enrollment remained static [Dana Whitmer, App. 565-566 (T. 652)].

While it is true there are old schools attended predominantly by black students, it is also true there are old schools attended predominantly by white students. Examples of this are McConnell, built in 1901 and Bagley built in 1927 which are predominantly black schools and Baldwin built in 1901 and Wisner built in 1911 which are predominantly white schools [App. 550-551 (T. 633-635)].

**Teacher Employment and Assignment**

The record contains no evidence of discrimination against teachers on the basis of race. Mrs. Hayes was not promoted to an administrative position, and by her own testimony she did not possess the educational requirements for the position for which she applied.[5] There is no evidence that she was rejected because of her race. Mr. Perdue applied for an assistant superintendent's position. Another person who happened also to be Negro, was selected in his stead. The other person declined the appoint-

[5] Mrs. Hayes testified that she applied for a principal's position twice and was turned down. She testified that the published qualifications for the job were both teaching experience and a master's degree (App. 46). On cross examination she acknowledged that she did not have a master's degree at either time she made application, but she felt that she soon would be entitled to receive a master's degree [App. 52 (T. 45-46)].

ment and subsequently the position was abolished. There is no evidence that Mr. Perdue was discriminated against because of his race [App. 479-481 (T. 550-553)]. The order of the District Court would appear to require defendants to appoint a Negro assistant superintendent for no other reason than to have a Negro assistant superintendent.

Mr. Perdue testified that he knows of both black and white persons who had the academic qualifications for promotion, who applied for promotion, and were turned down [App. 132 (T. 137)].

The record shows that teachers are employed on the basis of merit without regard to race, color or national origin and that where vacancies developed every effort is made to place a teacher in the school where the student population is predominantly of a race different from that of the teacher. See Defendants' Exhibits 8, 9, 11, 12 (App. 934, 935, 936, 938). Despite the desire of the Pontiac Public Schools to cause members of both races to teach throughout the school system the record shows that it is sound administrative policy to give consideration to teacher preferences when making assignments. In addition under the contract between Pontiac Public Schools and the Pontiac Education Association the preferences of teachers in placement and assignment must be recognized. [See Defendants' Exhibit 13, App. 939; see also the testimony of Richard Fell, App. 459-460 (T. 429-430)]. Some white teachers are concerned that they lack the ability to cope with the real or imaginary problems in a predominantly black school and to relate with students in a predominantly black school. Some Negro teachers feel a commitment to teach in predominantly Negro schools [App. 614-615 (T. 713-714)].

The faculty of every school has both white and Negro teachers on its staff (Defendants' Exhibits 11 and 12, App.

936-938).[6] Approximately 30% of the elementary faculty in the Pontiac Public Schools are Negro and 24% of the faculty in the secondary schools are Negro. The Negro pupil population in Pontiac is approximately 30%. As recently as 1963, 11.7% of the faculty were Negro. See testimony of Mr. Crew [App. 341-366 (T. 388-419)]. See Defendants' Exhibit 11, App. 936.

The Pontiac Public Schools have for a number of years been actively recruiting Negro teachers. Currently 35% of the replacements employed in the 1969-70 school year were Negro. This is the result of the active recruitment of Negroes. See Defendants' Exhibit 11, App. 936, and testimony of Mr. Crew [App. 364 (T. 416-417)].

The racial distribution of all employees of Pontiac Public Schools as of January 1970 was 72.4% white and 27.6% Negro. See testimony of Superintendent Whitmer [App. 613 (T. 710)].

**Pontiac Practices To Promote Interracial Experiences**

Pursuant to the policy set forth in Defendants' Exhibit 6 which became effective in 1964, the Pontiac Public Schools carried out the following practices:

1. Frost Elementary School was constructed and at the time of its opening in 1963 it was a perfectly racially balanced school with 32% of the pupils being Negro. Because of family mobility the pupil population changed to 57% Negro in six years [App. 297-301 (T. 336-340)].

2. In 1964 the boundary lines were changed between Central High School and Northern High School for the purpose of reducing racial imbalance in the two high schools [App. 597 (T. 692)].

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[6] The Trial Court made the finding that there is no Negro teacher on the faculty of Alcott School, but the Record contradicts this finding (See Defendants' Exhibit 11, App. 936).

3. The Board of Education adopted a long-range plan for the improvement of education and to foster interracial experiences in the Pontiac Public Schools on December 13, 1967 (Defendants' Exhibit 20, App. 1005).

4. The Pontiac Public Schools have under construction a new Human Relations Center which will contain pre-school training as well as elementary training and services for the adults in the community. The Center is planned in such a way that it is expected to be racially balanced [App. 593-597 (T. 687-691)].

5. The Lincoln Elementary School has been constructed in a predominantly white area with the option for Negro pupils to attend that school from the Wilson Elementary School, a predominantly black school. Every parent who applied for his child to take advantage of this voluntary transfer from a predominantly Negro school to this predominantly white school had his request granted. Approximately one-third of the pupils who were granted permission to take advantage of this opportunity later decided not to attend Lincoln School but two-thirds of those who applied actually have taken advantage of this opportunity [App. 697 (T. 813)].

6. The recruitment of Negro teachers has been greatly expanded (Defendants' Exhibit 14, App. 988, 989).

7. New instructional materials and a program in Negro history have been introduced into the curriculum [App. 603 (T. 698-699)].

8. A Human Relations Institute has been established to develop understanding between the two races. See the testimony of Mr. Perdue [App. 150 (T. 158-159)].

9. Pontiac Public Schools have consistently worked toward the reduction of class size so as to improve the educational opportunities for all students. See Defendants' Exhibit 5 (App. 927).

10. The Pontiac Public Schools have special programs

for disadvantaged and handicapped students [App. 593-597 (T. 687-692)].

11. The Pontiac Public Schools have programs of enrichment and compensatory education to provide for the needs of students that come to school without strong family support [App. 593-597 (T. 687-692)].

12. A site has been purchased north of the city limits in Pontiac township with the purpose of establishment of a racially balanced school at this location [App. 597 (T. 691-692)].

13. The school board decided not to purchase an elementary school site in the Bloomfield Townhouse development on Woodward Avenue for the reason that it would detract from efforts to promote interracial experiences. The school board is searching for a site that can serve students in this area with a racially balanced school [App. 598 (T. 692)].

## SUMMARY OF FACTS

Pontiac Public Schools are in the State of Michigan where segregation in schools has been unlawful since 1867. The Pontiac Public Schools have administered the neighborhood school policy; schools have been built where they are most convenient to the largest number of students and pupils have been assigned to attendance zones in accordance with the criteria of proximity of school, capacity of school and safe routes of travel between home and the school.

From 1964 to date, the Pontiac Public Schools have added the criterion of reduction in racial imbalance where this is possible without violating the other three criteria. Each school reflects the racial composition of the neighborhood it serves. There have been a number of boundary changes but in every case the boundary change has been relatively minor and has been done because of the move-

ment of families, construction of new real estate developments, and the construction of new schools. Schools in Pontiac reflect various racial compositions from all one race to all of the other race including various percentages between those two extremes, but Negroes attend 31 of the 37 schools. There are both white and black teachers on the faculty of every school in the Pontiac School System. (Defendants' Exhibits 11 and 12, App. 936-938.)

## REASONS TO GRANT PETITION

When *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 ALR 2d 1180 (1954) was decided, there was no question but that the court was referring to state action to separate pupils on the basis of race.[7]

Segregation was expanded to include not only the statutory schemes enumerated in the Appendix at p. 39, but also state action in the form of arbitrary gerrymandering and similar indirect means of segregation. *Clemons* v. *The Bd. of Ed. of Hillsboro, Ohio*, 228 F.2d 853, *cert. den.* 350 U.S. 1006 (6th Cir. 1956).

Recently this Court stated:

> "This case and those argued with it *arose in states having a long history of maintaining two sets of schools*

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[7] The Court in *Brown* stated:

> "In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a non-segregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race." *Brown* v. *Board of Education*, 347 U.S. 483, 487-488

In the Appendix is an analysis of all state statutes and constitutional provisions that required segregation that were in existence in 1954. See p. 39, *infra*.

> *in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5-6, 28 L. Ed. 2d 554, 560-561 (1971).

A careful reading of the record in this case and a careful comparison of this record with the records in *Deal* v. *Board of Education,* 419 F. 2d 1387 (6th Cir. 1969) cert. den. 91 S.Ct. 1630; *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir. 1964) cert. den. 380 U.S. 914; and *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209 (7th Cir. 1963) cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L. Ed. 2d 216, discloses little substantial difference between the facts in Pontiac and the facts in Cincinnati, Gary, Indiana and Kansas City.[8] Furthermore, essentially the same facts in Pontiac were reviewed before by the same court, but a different judge, with directly contrary results. *Henry* v. *Godsell, et al,* 165 F. Supp. 87, 89 (1958). In the previous Pontiac case (Godsell was the nominal representation of the Pontiac Board of Education), the trial court reviewed the whole Pontiac school system and noted that between 1954 and 1958, Pontiac built six new schools. The court said:

> In 1953, as part of this plan, the board decided to build a new elementary school to accommodate the excess capacity enrollment in schools serving the southwest quadrant of the city where by far the largest number of Negro families is concentrated. Two sites were under consideration for this new school, namely, the so-called Lake Street and the Gulf Drive sites.

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[8] Counsel for the petitioners has read the records in the Kansas, Gary, and Cincinnati cases and was counsel in both the trial and appellate procedures in the Cincinnati case. Mr. Harold W. Dudley, of Counsel in this appeal was trial counsel in both of the Pontiac cases.

> The Lake Street site, which was ultimately approved, was located in a densely populated area within a radius of half a mile from the homes of the children who attend the school. The children are subject to no safety hazards in their approach to the school. As a suitable location for a new school, the Gulf Drive site suffers by comparison. It has an absence of any sizeable concentration of population near that site. It is located 1.6 miles from the nearest home of the children of the area who need to be served and is separated from the population area to be served by a lake, a large swamp area, and a municipal golf course. There are no streets that directly connect the site and the residences of the children who would attend the school. The site is accessible only by traveling a circuitous route and crossing an arterial highway. The dangers to which children of tender years would have been exposed are readily apparent. On October 13, 1954, the Board decided to build on the Lake Street site. The new school was ready for occupancy at the beginning of the September 1955 term and is now populated almost exclusively by Negro children.
>
> Plaintiff has suggested that the difficulties presented by the Gulf Drive site could have been overcome either by building a causeway to provide a direct route to the site or by furnishing transportation between the site and the homes of the children. The Board of Education does not have the authority to construct roads, bridges or sidewalks. To provide transportation services would be costly, requiring the expenditure of funds that are needed to expand educational facilities. *Henry, et al* v. *Godsell, et al.*, 165 F. Supp. 87, 89-90 (1958).

In that case the trial court concluded:

> The School Board has a duty to provide educational facilities to all children without regard to their color. If it builds schools in areas where need exists, without arbitrarily fixing attendance areas to exclude any

> given segment of the school population, it is carrying out that duty. It may consider such factors in selecting sites that it considers relevant and reasonable and in the absence of a showing that the standards for selection are not relevant and reasonable, and that in reality they were adopted as a sham or subterfuge to foster segregation, or for any other illegal purpose, their use is within the administrative discretion of the school board. The fact that in a given area a school is populated almost exclusively by children of a given race is not of itself evidence of discrimination. The choice of a school site based on density of population and geographical considerations such as distance, accessibility, ease of transportation, and other safety considerations, is a permissible exercise of administrative discretion. The selection of the Lake Street school site was based upon these factors and the standards observed were not adopted as a devise to circumvent the law. *Henry, et al* v. *Godsell, et al,* 165 F. Supp. 87, 90 (1958).

Prior to the *Henry* v. *Godsell* case quoted above the Pontiac Public Schools did not keep any records based upon race. At the suggestion of the trial judge in that case it made a survey of the racial composition of all the schools and brought this information before the court. The trial court reviewed the racial composition of all the schools; the trial court found that Negroes were attending more than half the public schools in Pontiac, Michigan, and that in certain parts of the city, especially the southwest quadrant, there is a heavy concentration of Negroes which caused the schools to be predominantly black.

After reviewing all of the facts with regard to the whole school system the trial court in *Henry* v. *Godsell,* 165 F. Supp. 87, 91 (1958) concluded:

> Plaintiff also alleges that some attendance areas in the school district were altered in 1955 to compel or

achieve segregation. The allegation is devoid of merit. The Board of Education has altered and modified attendance areas from time to time to accommodate changes in population and as a result of the erection of new schools and additions to existing schools. The changes in attendance areas that were made in 1955 were in response to the building construction that was then taking place. In the absence of a showing that attendance areas had been arbitrarily fixed or contoured for the purpose of including or excluding families of a particular race the Board of Education is free to establish such areas for the best utilization of its educational facilities. Michigan statutes annotated, Section 15.3589. The evidence establishes that the same permissible considerations that served as a basis for selecting new school sites were employed in fixing school attendance areas.

The plaintiff has no constitutionally guaranteed right to attend a public school outside the attendance area in which she resides. The utter chaos that would prevail if each child were permitted to choose the school that he or she desired to attend without regard to the attendance area in which the child resides is readily apparent. It was a proper exercise of the Board's power to transfer plaintiff and others similarly situated to the Lake Street School when that school is designed to serve the area resided in by these children.

The main distinction between the new Pontiac case and the old Pontiac case and the other three cases is that in Cincinnati, Gary, and Kansas City and Pontiac I, the trial court made a specific finding of the absence of intentional segregation; whereas, in Pontiac II, the trial court made a specific finding of intentional segregation.[9]

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[9] Pontiac is a blue collar community with a growing Negro population. It is surrounded by other communities that are almost entirely white. In the opinion of counsel for the Pontiac Public Schools, the bussing

The facts are similar but the ultimate finding of the trial court in Pontiac is different.

Judge J. Braxton Cravens, Jr., of the United States Court of Appeals for the Fourth Circuit, recently described the difficulty he has in the identification of a "unitary system."

> "I have some difficulty with the *Northcross*[10] definition and so, indeed, does the Chief Justice. He calls it 'cryptic,' which makes me think of what Humpty-Dumpty said to Alice: 'When I use a word it means just what I choose it to mean — neither more nor less.' " 73 W. Va L. Rev. 1 (1970-71).

Every large city is characterized by residential housing patterns whereby people of similar ethnic backgrounds, socioeconomic status or race reside in proximity to each other. The following table demonstrates empirically what all casual observers have seen in every city.

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program which is ordered to be put into effect will cause a white flight that will convert the City of Pontiac into a black municipality. It is recognized that white flight and white resistance have been held to be an impermissible consideration. See Neil Jon Bloomfield: "Equality of Educational Opportunity: Judicial Supervision of Public Education" 43 S. Calif. L. Rev. 275, 298. The foreseeable disaster of race relations in terms of white flight in Pontiac will be a court made disaster. Even the trial court has taken judicial notice in post trial proceedings of the foreseeable white flight.

[10] *Northcross* v. *Board of Education*, 397 U.S. 232 (1970).

## INDEXES OF RESIDENTIAL SEGREGATION FOR 207 CITIES*

| City | Index | City | Index |
|---|---|---|---|
| Abilene, Tex. | 93.6 | Cambridge, Mass. | 65.5 |
| Akron, Ohio | 88.1 | Camden, N. J. | 76.5 |
| Albany, N. Y. | 76.5 | Canton, Ohio | 81.5 |
| Albuquerque, N. M. | 76.5 | Centreville, Ill. | 88.6 |
| Alexandria, Va. | 87.8 | Charleston, S. C. | 79.5 |
| Amarillo, Tex. | 88.6 | Charleston, W. Va. | 79.0 |
| Ann Arbor, Mich. | 64.3 | Charlotte, N. C. | 94.3 |
| Annapolis, Md. | 80.9 | Chattanooga, Tenn. | 91.5 |
| Asheville, N. C. | 92.3 | Chester, Pa. | 87.4 |
| Atlanta, Ga. | 93.6 | Chicago, Ill. | 92.6 |
| Atlantic City, N. J. | 89.2 | Cincinnati, Ohio | 89.0 |
| Augusta, Ga. | 93.0 | Cleveland, Ohio | 91.3 |
| Austin, Tex. | 93.1 | Columbia, S. C. | 94.1 |
| Bakersfield, Calif. | 87.5 | Columbus, Ga. | 92.2 |
| Baltimore, Md. | 89.6 | Columbus, Ohio | 85.3 |
| Baton Rouge, La. | 92.2 | Compton, Calif. | 84.4 |
| Battle Creek, Mich. | 80.2 | Corpus Christi, Tex. | 88.6 |
| Berkeley, Calif. | 69.4 | Covington, Ky. | 87.8 |
| Bessemer, Ala. | 87.9 | Dallas, Tex. | 94.6 |
| Beaumont, Tex. | 92.3 | Dayton, Ohio | 91.3 |
| Birmingham, Ala. | 92.8 | Daytona Beach, Fla. | 96.7 |
| Boston, Mass. | 83.9 | Decatur, Ill. | 88.4 |
| Bridgeport, Conn. | 69.7 | Denver, Colo. | 85.5 |
| Buffalo, N. Y. | 86.5 | Des Moines, Iowa | 87.9 |

* Source: Carl E. Taeuber and Alma F. Taeuber: *Negroes in Cities*, Chicago: Aldine Publishing Co. (1965) pp. 32-34.

It is apparent that the authors are using the term "Segregation" in a non-legal sense in that they make no attempt to attribute residential housing patterns of a racial character to legal sources. At pages 22 and 23 they observe "For most Negroes, to live near family and friends is to live near other Negroes; on a mass basis this will produce a high degree of residential segregation. Residential segregation may have other voluntary aspects. It is sometimes argued by both Negroes and whites that Negroes enjoy a greater measure of freedom in Negro areas where they need not be concerned about getting along in the face of continued slights and discriminatory acts." They recognize, however, that there probably are many situations where private acts

| City | Index | City | Index |
|---|---|---|---|
| Detroit, Mich. | 84.5 | Hartford, Conn. | 82.1 |
| Durham, N. C. | 92.7 | Highland Park, Mich. | 77.4 |
| East Chicago, Ill. | 82.8 | High Point, N. C. | 94.4 |
| East Orange, N. J. | 71.2 | Houston, Tex. | 93.7 |
| East St. Louis, Ill. | 92.0 | Huntington, W. Va. | 88.8 |
| Elizabeth, N. J. | 75.2 | Huntsville, Ala. | 87.9 |
| El Paso, Tex. | 80.5 | Indianapolis, Ind. | 91.6 |
| Englewood, N. J. | 87.9 | Inkster, Mich. | 95.0 |
| Erie, Pa. | 86.9 | Jackson, Mich. | 89.3 |
| Evanston, Ill. | 87.2 | Jackson, Miss. | 94.2 |
| Evansville, Ind. | 91.2 | Jacksonville, Fla. | 96.9 |
| Fayetteville, N. C. | 88.4 | Jersey City, N. J. | 77.9 |
| Flint, Mich. | 94.4 | Joliet, Ill. | 90.2 |
| Fort Lauderdale, Fla. | 98.1 | Kalamazoo, Mich. | 82.8 |
| Fort Smith, Ark. | 90.3 | Kansas City, Kan. | 91.5 |
| Fort Wayne, Ind. | 91.7 | Kansas City, Mo. | 90.8 |
| Fort Worth, Tex. | 94.3 | Knoxville, Tenn. | 90.7 |
| Fresno, Calif. | 83.9 | Lakeland, Fla. | 96.3 |
| Gadsden, Ala. | 89.1 | Lansing, Mich. | 89.3 |
| Galveston, Tex. | 82.9 | Las Vegas, Nev. | 91.8 |
| Gary, Ind. | 92.8 | Lexington, Ky. | 87.0 |
| Grand Rapids, Mich. | 90.1 | Lima, Ohio | 85.1 |
| Greensboro, N. C. | 93.3 | Little Rock, Ark. | 89.4 |
| Greenville, S. C. | 89.7 | Long Beach, Calif. | 84.0 |
| Hamilton, Ohio | 91.7 | Lorain, Ohio | 79.8 |
| Hampton, Va. | 85.8 | Los Angeles, Calif. | 81.8 |
| Harrisburg, Pa. | 85.7 | Louisville, Ky. | 89.2 |

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by white residents excludes Negroes from certain neighborhoods in most communities; however, this is not done on the basis of any legal power.

The "Segregation Index" is an index of dissimilarity, and its underlying rationale as a measure of residential segregation is simply:

> "Suppose that whether a person was Negro or white made no difference in his choice of residence, and that his race was not related to any other factors affecting residential location (for instance, income level). Then no neighborhood would be all-Negro or all-white, but rather each race would be represented in each neighborhood in approximately the same proportion as the city as a whole. Thus, in a city where Negroes constitute half the population, the residents of any city block would be about

| City | Index | City | Index |
|---|---|---|---|
| Lubbock, Tex. | 91.3 | Oklahoma City, Okla. | 87.1 |
| Lynchburg, Va. | 84.0 | Omaha, Neb. | 92.0 |
| Macon, Ga. | 83.7 | Orlando, Fla. | 98.0 |
| Memphis, Tenn. | 92.0 | Pasadena, Calif. | 83.4 |
| Miami, Fla. | 97.9 | Passaic, N. J. | 71.8 |
| Midland, Tex. | 93.4 | Paterson, N. J. | 75.9 |
| Milwaukee, Wis. | 88.1 | Pensacola, Fla. | 90.7 |
| Minneapolis, Minn. | 79.3 | Peoria, Ill. | 86.7 |
| Mobile, Ala. | 91.9 | Philadelphia, Pa. | 87.1 |
| Monroe, La. | 96.2 | Phoenix, Ariz. | 85.6 |
| Montclair, N. J. | 80.3 | Pittsburgh, Pa. | 84.6 |
| Montgomery, Ala. | 94.7 | Pontiac, Mich. | 90.5 |
| Mount Vernon, N. Y. | 73.2 | Port Arthur, Tex. | 90.4 |
| Muncie, Ind. | 92.1 | Portland, Ore. | 76.7 |
| Nashville, Tenn. | 91.7 | Portsmouth, Va. | 94.0 |
| Newark, N. J. | 71.6 | Providence, R. I. | 77.0 |
| Newburgh, N. Y. | 84.2 | Racine, Wis. | 87.8 |
| New Haven, Conn. | 70.9 | Raleigh, N. C. | 92.8 |
| New Orleans, La. | 86.3 | Reading, Pa. | 76.2 |
| Newport News, Va. | 90.2 | Richmond, Calif. | 77.3 |
| New Rochelle, N. Y. | 79.5 | Richmond, Va. | 94.8 |
| New York City, N. Y. | 79.3 | Riverside, Calif. | 85.5 |
| Niagara Falls, N. Y. | 82.3 | Roanoke, Va. | 93.9 |
| Norfolk, Va. | 94.6 | Rochester, N. Y. | 82.4 |
| North Little Rock, Ark. | 93.8 | Rockford, Ill. | 89.4 |
| Norwalk, Conn. | 74.3 | Sacramento, Calif. | 63.9 |
| Oakland, Calif. | 73.1 | Saginaw, Mich. | 87.5 |
| Odessa, Tex. | 98.0 | St. Louis, Mo. | 90.5 |

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equally divided between Negroes and whites. In a city where Negroes constitute 10% of the population, one of every ten households in each block might be expected to be Negro. This situation would represent a completely even distribution of Negroes and whites, with the same proportion of Negro in each and every block. For this situation, the Segregation Index assumes a value of zero, indicating no racial segregation whatsoever.

"The opposite situation, that of a completely uneven or segregated distribution, occurs if there is no residential inter-mixture of whites and Negroes. Operationally, this situation obtains if each city block contains only whites or only Negroes, but not

| City | Index | City | Index |
|---|---|---|---|
| St. Paul, Minn. | 87.3 | Tampa, Fla. | 94.5 |
| St. Petersburg, Fla. | 97.1 | Terre Haute, Ind. | 90.1 |
| Salisbury, N. C. | 91.4 | Toledo, Ohio | 91.8 |
| Salt Lake City, Utah | 68.9 | Topeka, Kan. | 83.5 |
| San Antonio, Tex. | 90.1 | Trenton, N. J. | 79.6 |
| San Bernardino, Calif. | 84.0 | Tucson, Ariz. | 81.1 |
| San Diego, Calif. | 81.3 | Tulsa, Okla. | 86.3 |
| San Francisco, Calif. | 69.3 | Tuscaloosa, Ala. | 89.7 |
| San Jose, Calif. | 60.4 | Vallejo, Calif. | 83.1 |
| San Mateo, Calif. | 87.6 | Waco, Tex. | 90.7 |
| Santa Monica, Calif. | 83.3 | Warren, Ohio | 90.4 |
| Savannah, Ga. | 92.3 | Washington, D. C. | 79.7 |
| Seattle, Wash. | 79.7 | Waterbury, Conn. | 79.9 |
| Shreveport, La. | 95.9 | Waterloo, Iowa | 89.4 |
| South Bend, Ind. | 85.8 | West Palm Beach, Fla. | 97.7 |
| Spartanburg, S. C. | 87.5 | White Plains, N. Y. | 79.3 |
| Spokane, Wash. | 80.1 | Wichita, Kan. | 91.9 |
| Springfield, Ill. | 86.9 | Wichita Falls, Tex. | 88.5 |
| Springfield, Mo. | 81.2 | Wilmington, Del. | 79.8 |
| Springfield, Ohio | 84.7 | Wilmington, N. C. | 92.3 |
| Stamford, Conn. | 78.0 | Winston-Salem, N. C. | 95.0 |
| Statesville, N. C. | 88.1 | Yonkers, N. Y. | 78.1 |
| Stockton, Calif. | 70.6 | York, Pa. | 78.1 |
| Syracuse, N. Y. | 81.1 | Youngstown, Ohio | 78.5 |
| Tacoma, Wash. | 80.4 | | |

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both. For this situation, the Segregation Index assumes a value of 100, indicating a maximum degree of residential segregation.

"The index of residential segregation can assume values between 0 and 100. The higher the value, the higher the degree of residential segregation, and the lower the value, the greater the degree of residential intermixture. The value of the Index may be interpreted as showing the minimum percentage of non-whites who would have to change the block on which they live in order to produce an unsegregated distribution — one in which the percentage of non-whites living on each block is the same throughout the city (0 on the Index)." Taeuber, Op. cit. pp. 29-30.

It is obvious that to superimpose a neighborhood school system on any large city, it is to cause schools to take on the racial, ethnic, or socio-economic quality of the neighborhood it serves. The same is true for Boy Scout troops, churches, public libraries, playgrounds and parks that are arranged in such a way as to be convenient to particular neighborhoods.

Notwithstanding the fact that a legitimate neighborhood school policy always produces some predominantly white and some predominantly black schools the court has recently approved the neighborhood school policy:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." *Swann* v. *Board of Education*, 402 U.S. 1, 28 (1971).

In this case the trial court found that the failure to take affirmative steps to eliminate racial imbalance constitutes intentional segregation. This major premise, in the trial court's judgment is reiterated 18 times in the trial court's opinion.

There is no case where the Supreme Court of the United States has agreed with the trial court's major premise. The overwhelming weight of authority has repudiated it.[11]

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[11] *Bell* v. *School City of Gary, Indiana*, 324 F. 2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924
*Deal* v. *Board of Education*, 419 F. 2d 1387 (6th Cir. 1969) cert. den.
*Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (10th Cir. 1964) cert. den. 380 U.S. 914
*Henry* v. *Godsell*, 165 F. Supp. 87 (E.D.Mich. 1958)
*Banks* v. *Muncie Community Schools*, 433 F. 2d 292 (7th Cir. 1970)
*Olson* v. *Board of Education*, 250 F. Supp. 1000, 1006 (1966), aff'd 367 F. 2d 565
*Webb* v. *Board of Education*, 223 F. Supp. 466, 468 (1963)

The foundation for the determination that the Pontiac Public Schools are guilty of intentional segregation is reiterated 18 times by the trial court. Each of these instances is set forth:

1. Plaintiffs assert that the racial integration policies adopted by the defendant, Pontiac Board of Education have not been pursued in good faith by the administration, but rather that the actual policy of the Board has been and is knowingly to permit the existence of segregated[12] facilities when such could have been avoided. (infra, p. 60)

2. * * * It must be determined if and where failures or *omissions* on the part of defendants may have occurred and what, if anything, now can be done to halt the furtherance of an (sic) abhorable situa-

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*Broussard* v. *Houston*, 262 F. Supp. 266, 270 (1966), aff'd 395 F. 2d 817 (5th Cir. 1968)
*Griggs* v. *Cook*, 272 F. Supp. 163, 169 (1967), aff'd 384 F. 2d 705 (5th Cir. 1967)
*Dowell* v. *Board of Education*, 375 F. 2d 158, 166 (6th Cir. 1967), cert. den. 387 U.S. 931
*Offerman* v. *Nitkowski*, 378 F. 2d 22, 24 (1967)
83 Harv. L. Rev. 1439, N. 34 (1970)
79 Yale L. J. 669 (1970)
82 Harv. L. Rev. 1185 (1969)
81 Harv. L. Rev. 698-99, 1512 (1968)
53 Ia. L. Rev. 1184-85 (1968)
35 G. Wash. L. Rev. 701 (1967)
41 N. Dak. L. Rev. 347, 351-352 (1965)

[12] Throughout the record and the proceedings, the term *segregated* is used in the sense of "de facto segregation" which is alleged in the plaintiff's Complaint. Thus in the vocabulary of this case, the term segregated would have been applied to a neighborhood school which was all black because of neighborhood residential patterns, not because of gerrymandering or any official state policy or action. Complaint, Count 1, (App. 308), Trial Court's opinion, *infra*, p. 60, where the trial court states:

> "Plaintiffs contend that the elementary, secondary and high schools within the City of Pontiac operate under a system of de facto segregation * * *," and testimony of John Purdue (App. 124).

tion for which no one admits responsibility or wishes to accept blame.[13] (infra, p. 63)

3. Yet, the testimony clearly reveals that in 1954 when boundary lines were first drawn designating school attendance zones, *the only criteria employed in determining the zones was nearness of school, safety of access routes and capacity.*[14] (infra, p. 67)

4. Despite any pronouncements or resolutions adopted, the testimony clearly reflects that the Board of Education never considered achievement of *racial balance* as a factor in setting the original boundaries. (infra, pp. 67-68)

5. The testimony further indicates without question that ever since the incorporation of this fourth factor in 1964, there has been neither an attempt nor even a consideration toward modification, alterations or realignment of boundaries in light of the 1964 resolution. (infra, p. 68)

6. It follows quite logically then that achievement of *racial balance* had never been a legitimate factor in the setting of boundary lines. (infra, p. 68)

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[13] The Trial court was obviously moved by a determination that Negro children are being harmed. The court made this specific finding although there is no evidence in the record to support it. The record contains no information with respect to I.Q. tests, achievement tests, or other indicia of academic achievement of white or Negro pupils in Pontiac, nor was there any psychological or psychiatric evidence introduced. Even if there had been evidence to substantiate this finding, it would still be questionable. See Neil, J. on Bloomfield: Equality of Educational Opportunity: Judicial Supervision of Public Education, 43 S. Calif. L. Rev. 275.

[14] This criteria is clearly constitutional, *Swann* v. *Board of Education*, 402 U.S. 1, 28 (1971).

7. The 1964 pronouncement was made, but resulted in absolutely no realignment of existing boundary lines for the purpose of obtaining greater *racial balance*. (infra, p. 68)

8. In addition, between the period of 1955 and 1964 nine new schools were also built without any consideration given toward achieving a *racial mixture*. (infra, p. 68)

9. * * * Between 1955 and 1969 the School Board has found it necessary to change the zones for boundary of its attendance areas twelve times; the testimony reveals that the changes resulted from the addition of new facilities, and were *never drawn originally nor modified with the isolated purpose of attempting to achieve maximum racial balance within the schools.* (infra, p. 69)

10. There has been no attempt to rearrange boundary lines within the area so as to obtain a *greater degree of racial mixture* * * *. (infra, p. 70)

11. As mentioned earlier, none of the nine[15] schools built within the period of 1955 through 1963 was located with any consideration to the *achievement of racial mixture*. (infra, p. 69)

12. Rather than taking affirmative steps to counteract the pattern obviously developed as of 1955, the School Board, to the contrary, by its location of additional schools subsequent to 1955, assured the progression of that segregated pattern. (infra, p. 71).

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[15] Six of these nine schools were built before *Henry* v. *Godsell*, 165 F. Supp. 87 (1958). Their locations and boundary lines were approved by the United States District Court in 1958.

13. When power to act is available, failure to take the necessary steps as to negate or alleviate a situation which is harmful is as wrong as the taking of affirmative steps to advance the situation. *Sins of omission* can be as serious as sins of comission. (infra, p. 72)

14. The Board of Education cannot absolve itself from responsibility for this situation when it had the power, duty and control to prevent the situation. It would be vain modesty on the part of the Board of Education to suggest that it is controlled by a situation rather than that it can control. (infra, p. 73)

15. For a school board to acquiesce in a housing development pattern and then to disclaim liability for the eventual segregated characteristic that such a pattern creates in the schools is for the board to abrogate and ignore all power, control or responsibility. (infra, p. 73)

16. The Board of Education simply cannot permit a segregated situation to come about and then blithely announce that for a Negro student to gain attendance to a given school, all he must do is live within the school's attendance area. To rationalize thusly is to be blinded to the realities of adult life with its prejudices, and *opposition to integrated housing.* (infra, p. 73)

17. The question is no longer where the first move must be made in order to accomplish equality within our society; the question has become and possibly always has been, *who had the power* and the duty *to make those moves* so as to advance the accomplishment of that equality. (infra, p. 73)

18. This court believes that the Pontiac Board of Education had and has the power and responsibility to make decisions as to locations of new schools and boundary lines so as to achieve an integrated student body. (infra, p. 73)

The foregoing 18 findings of the trial court are made with regard to a school system where segregation has been unlawful since 1867 and which had applied a color blind policy until 1964 when it became benevolently color conscious.

If a school district is guilty of intentional segregation because it does not counteract racial residential housing patterns, then it will be impossible to run a school system in any big city without bussing. See Indexes of Residential Segregation for 207 Cities, *supra*, pp. 25-28. The Supreme Court has never stated this to be the law of the United States.

The complaint alleged *de facto* segregation, that is segregation growing out of residential housing patterns rather than any state law or policy. The trial court's opinion made reference to de facto segregation and repeatedly referred to the desirability of racial balance. The trial court made numerous subsidiary findings of fact on the subject of racial balance and on the failure of the school board to counteract neighborhood housing patterns. The trial court then came upon the general finding of intentional segregation. The only way this general finding could have been reached was based upon the premise that the trial court repeatedly stated, viz, *Failure of a school system to counteract residential housing patterns constitutes intentional segregation.*

The Court of Appeals affirmed for the reason that it could not say that the general finding of intentional segre-

gation was "clearly erroneous" as required in Rule 52 (a) of the Rules of Civil Procedure.[16]

It is impossible to study the records in the Cincinnati, the Gary, Kansas City, and the two Pontiac cases and to compare the ultimate findings of the trial courts in those several cases, without coming to the conclusion that there is confusion as to what constitutes *segregation*. The trial court in the second Pontiac case manifested this confusion by repeated subsidiary findings of fact that deal with *de facto* segregation, racial balance and a failure to counteract residential housing patterns, none of which has any legal relevance to a school system in Michigan which has been integrated by law and in fact for over one hundred years.

If the ultimate finding of segregation or the absence of segregation is not to be reviewed in light of the subsidiary findings of the court, because of Rule 52 (a) then the law on what constitutes segregation is left to the conscience of every trial judge. Regardless of the factual pattern and regardless of the subsidiary findings it would appear that once the trial court makes the ultimate finding, it is untouchable. If this be the state of the law on segregation, then all that would be necessary to exonerate the school board is for a trial court to use the magic formula: *the court holds that the evidence does not support the charge of intentional segregation.* Conversely all that would be necessary to empower a trial judge to take over and reorganize a school system in accordance with his highest

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[16] The Court of Appeals was wrong to affirm on this basis when there was a clear incompatibility between the subsidiary findings and the ultimate finding of segregation.

If the Court of Appeals was reluctant to reverse, the least it should have done was to remand the case back to the trial court for subsidiary findings compatable with the ultimate finding. *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, 63-64 (1966); *Kelley* v. *Everglades Drainage District*, 319 U.S. 419, 420, 63 S. Ct. 1141, 87 L. Ed. 1485 (1943).

ideals[17] is for the trial court to use the magic formula: *the court finds intentional segregation.*

The fact is that the record in Cincinnati, Kansas City, Gary and the first Pontiac cases are substantially similar

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[17] There is no question but that the trial judge in the second Pontiac case is trying to reorganize the Pontiac Public Schools in accordance with his highest ideals of social progress. It is equally true that the trial court is more concerned with advancing his notions of social reform than with whether or not the trial court's orders are actually authorized by the Constitution. A good illustration of this is an order that was entered on the 11th day of August, 1971, on the court's own motion which is:

> "It is further ordered that the defendants forthwith create an additional position for a third assistant superintendent to be employed in the administration of the Pontiac Public Schools; that this third assistant superintendent be black."

The Pontiac Public Schools have long operated with two Assistant Superintendents. Properly it is a question of legislative or administrative discretion with the Board of Education to determine whether it is to have two or three assistant superintendents.

The question of whether or not this particular order was in excess of the court's discretion, even if the court's finding of segregation be upheld is on its way to this Court through an appeal to the Sixth Circuit at the present time.

The court's reasoning in entering this order is stated in the record of proceedings that took place on 12 July, 1971 in the United States District Court for the Eastern District of Michigan, Southern Division:

> "I think it is good for the black children out there in terms of image. I think it is good for the white children out in Pontiac to see a black Assistant Superintendent of Schools. I think it is good at the policy level to have a black person in there, sitting in, knowing precisely what is happening in the school system. I think it is healty for the entire community."

The record shows that Pontiac has long had black directors (the level immediately below assistant superintendent), black principals, and black assistant principals. The court clearly entered this order not because of any constitutional requirement, but becauses of the court's own notion as to what is good social policy. The Supreme Court of the United States has held in *Swann* v. *Board of Education*, 402 U.S. 1 (1971) the power of a federal court to reorganize a school system extends only to the elimination of constitutional vices; not to the extent of carrying out the trial judge's social ideals. See also Paul A. Freund: "Civil Rights and the Limits of Law," 14 Buffalo L. Rev. 199 (1964).

to the record in Pontiac II. If the dissimilar result in Pontiac II is not to be carefully reviewed, then the law of segregation is reduced to witchcraft. Rule 52 (a) will defend any result as long as the trial court selects the appropriate *magic phrase.*

It is important to the United States and it is important to all of its people for the Supreme Court to make clear whether or not the types of activities set forth in the 18 specific findings above constitute intentional segregation. In this instance as in many important occasions, it would appear the obvious has become obscure. Everyone has assumed that he knows what segregation is. Everyone who reads *Brown* and *Swann* and all of the cases in between is intellectually and emotionally satisfied that he has been duly instructed as to the meaning of the word *segregation.* Notwithstanding the universal assumption that segregation is clearly understood the only way that one can reconcile Cincinnati, Kansas City, Gary, and Pontiac I with Pontiac II is to think of *segregation* in the terms of Humpty-Dumpty's statement to Alice:

> "When I use a word, it means just what I choose it to mean — neither more nor less."[18]

## SUMMARY

This is a case where racial composition of schools was determined by residential housing patterns, not by state or by school board policy. The trial court found an affirmative duty to balance races, notwithstanding that schools had been integrated for over a hundred years.

Previously, the United States District Court had reviewed the same facts and arrived at the opposite result. *Henry* v. *Godsell,* 165 F. Supp. 87 (1958).

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[18] L. Carroll: *Through the Looking Glass,* 124 (1875).

There is apparent confusion in the trial court as to what constitutes segregation, since the Petitioners have been ordered to carry out not the requirements of the Constitution, but social policy the trial court thinks desirable. The Court of Appeals affirmed the ultimate finding of segregation notwithstanding the fact that the complaint and the subsidiary findings deal not with state action, but with a failure of the Pontiac School Board to affirmatively correct neighborhood housing patterns. The trial court's subsidiary findings dealt with *de facto* segregation; nevertheless, the trial court made an ultimate determination of *de jure* segregation. A court does not make something which has previously been recognized as not being segregation into segregation by merely calling it such.

Respectfully,

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# APPENDIX

## NOTE ON DE JURE SEGREGATION

The trial court has concluded that the Pontiac Public Schools are guilty of de jure segregation under *Brown* v. *Board of Education*, 347 U. S. 483, 7 U. S. Ct. 686, 98 L. Ed. 875, 38 A.L.R. 2d 1180.

This conclusion involves a new rule of law, viz, when a school board might have acted to balance races, but did not, it is guilty of de jure segregation.

The Supreme Court of Ohio once observed:

> "Let us paraphrase the statement of Webster upon the occasion when he pictured the mariner endeavoring to ascertain how far he had been driven by the elements from his true course and suggested that we 'imitate his prudence and before we float further on the waves refer to the point from which we departed, that we may at least be able to conjecture where we now are.'" *Industrial Commission of Ohio* v. *Gintert* (Matthias, J.), 128 Ohio St. 2d 130-131 (1934)

With the foregoing in mind, this note reports what was found to be de jure segregation at the time of the *Brown* case.

At the time of the *Brown* decision in 1954, 17 states and the District of Columbia required segregation of public schools. Those states were Alabama, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia.

Segregation was permitted in four states: Arizona, New Mexico, Kansas and Wyoming.

Segregation was prohibited in 16 states: Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Massachusetts,

Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington and Wisconsin.

Eleven states had no specific legislation on segregation: California, Montana, Maine, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Utah and Vermont.

Of the four states listed above as permitting segregation only *Wyoming* had a constitutional provision pertaining to discrimination in schools. Article 7, Section 10 of the Wyoming Constitution of 1890 provided that:

> "In none of the public schools so established and maintained shall distinction or discrimination be made on account of sex, race or color."

But the Wyoming Code, Section 67-624 of 1945 provided that:

> "When there are fifteen (15) or more colored children within any school district, the board of directors thereof, with the approval of the county superintendent of schools, may provide a separate school for the instruction of such colored children."

The 1949 code of *Arizona* provided for school segregation in two separate provisions. Section 54-416 provided that:

> "The powers and duties of the board of trustees of school districts are as follows: * * * They shall segregate pupils of the African race from pupils of the Caucasian race in all schools other than high schools, and provide all accommodations made necessary by such segregation."

Section 54-430 provided that the board of trustees of the Arizona schools

> "* * * may segregate groups of pupils and may main-

tain special schools during the vacation as necessary for the pupils of the district."

The 1949 code of *Kansas,* Chapter 72, Section 1724 provided that the board of education should have the power to

"* * * organize and maintain separate schools for the education of white and colored children * * *"

The *New Mexico* Code, Section 73-13-1 provided that:

"* * * where, in the opinion of the county school board or municipal school board and on approval of said opinion by the state board of education, it is for the best advantage and interest of the school that separate rooms be provided for the teaching of pupils of African descent, and said rooms are so provided, such pupils may not be admitted to the school rooms occupied and used by pupils of Caucasian or other descent."

The constitutional and statutory provisions requiring segregation in the public schools in the 18 jurisdictions indicated above are as follows:

*Alabama*: Constitution of 1901, Article 14, Section 256:

"Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."

Alabama Code, Title 52, Section 93:

"The county board of education shall provide schools of two kinds, those for white children and those for colored children."

*Arkansas*: The Arkansas Constitution contains no provision requiring segregation, but the Arkansas Code of 1947, Section 80-509 provides that:

"The board of school directors of each district in the State shall be charged with the following powers and perform the following duties: * * * (c) Establish separate schools for white and colored persons."

*Delaware*: Constitution, Article 10, Section 2:

"* * * and separate schools for white and colored children shall be maintained."

Delaware Code, 14 Delaware Laws Section 141:

"(b) The schools provided shall be of two kinds; those for white children and those for colored children."

The *District of Columbia* required segregation under Sections 281, 282, 306, 310 and 314 of the 1864 District of Columbia Code. Section 281 says:

"It shall be the duty of the school-board to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school-funds, to be determined by the numbers of white and colored children, between the ages of six and seventeen years, to the payment of teachers' wages, to the building or renting of school-rooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable, and practical education of colored children in said portion of the district."

*Florida*: Constitution, Article 12, Section 12:

"White and colored children shall not be taught in the same school, but impartial provision shall be made for both."

Florida Code, Section 228.09:

> "The schools for white children and the schools for negro children shall be conducted separately."

*Georgia*: Constitution, Article 8, Section 2-6401:

> "Separate schools shall be provided for the white and colored races."

Georgia Code annotated 2-6401 required segregation in the schools, but there is no copy of this provision in the libraries which I have investigated.

*Kentucky*: Constitution, Section 187:

> "In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

Kentucky Revised Statutes, Section 158.020 (1):

> "Each board of education shall maintain separate schools for the white and colored children residing in its district."

See also subsections (2) to (5) of this section of the Kentucky Code.

*Louisiana*: Constitution, Article 12, Section 1:

> "Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years * * *"

Title 17 of the Louisiana Revised Statutes Sections 331 and following requires segregation, but I have found no copy of these provisions.

*Maryland*: The Maryland Constitution contains no provision requiring segregation, but Article 77, Section 111 of the 1939 code of Maryland provides that:

> "All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State * * *"

and Section 192 provides that:

> "It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age * * *"

*Mississippi*: Constitution, Article 8, Section 207:

> "Separate schools shall be maintained for children of the white and colored races."

Mississippi Code, Section 6276:

> "Separate districts shall be made for the schools of the white and colored races * * *"

*Missouri*: Constitution, Article 9, Section 1 (a):

> "Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

Missouri Code, Section 163.130:

> "Separate free schools shall be established for the education of children of African descent; and it shall herein be unlawful for any colored child to attend any white school, or for any white child to attend a colored school."

*North Carolina*: Constitution, Article 9, Section 2:

> "And the children of the white race and the children

of the colored race shall be taught in separate public schools * * *"

North Carolina Code, Section 115-2 (1943):

"The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race * * *"

*Oklahoma*: Constitution, Article 13, Section 3:

"Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained."

70 Oklahoma statutes, Section 5-1 (1951):

"The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races with impartial facilities for both races."

See also Sections 5-2 to Section 5-19 which, among other things, makes it a crime for a teacher to permit a child to attend a school of another race, or for a teacher to teach in a school which is integrated, or for anyone to maintain or to operate such a school.

*South Carolina*: Constitution, Article 11, Section 7:

"Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

South Carolina Code of 1952, Section 5377:

> "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of the other race."

*Tennessee*: Constitution, Article 2, Section 12:

> "No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school."

Tennessee Code Section 49-1005:

> "The county board of education shall designate the schools which the children shall attend; provided, that separate schools shall be established and maintained for white and for negro children."

*Texas*: Constitution, Article 7, Section 7:

> "Separate schools shall be provided for the white and colored children; and impartial provision shall be made for both."

Texas Code (1950) Title 49, Article 2900:

> "No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children."

*Virginia*: Constitution, Section 140:

> "White and colored children shall not be taught in the same school."

Virginia Code, Section 22-221:

> "White and colored persons shall not be taught in the same school, but shall be taught in separate schools. * * *"

*West Virginia*: Constitution, Article 12, Section 8:

"White and colored persons shall not be taught in the same school."

West Virginia Code, Section 1775 (1955):

"White and colored pupils shall not receive instruction in the same schools, or in the same building."

No. 20477

# UNITED STATES COURT OF APPEALS

## For the Sixth Circuit

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DONALD DAVIS, JR., a minor by his mother and next friend MRS. SADIE DAVIS,

VERONICA NICHOLS, a minor by her mother and next friend MRS. JOHNNIE E. NICHOLS,

WILLIAM M. ELOBY, a minor by his father and next friend, WILLIAM ELOBY,

*Plaintiffs-Appellees,*

v.

SCHOOL DISTRICT OF THE CITY OF PONTIAC, INC.,

DANA P. WHITMER, Superintendent of Schools for the District of Pontiac,

RICHARD C. FELL, Assistant Superintendent of Schools for the District of Pontiac,

WILLIAM J. LACY, Assistant Superintendent of Schools for the District of Pontiac,

MONROE M. OSMUN, RUSSELL L. BROWN, ELSIE K. MIHALEK, WILLIAM H. ANDERSON, LUCILLE D. MARSHALL, ROBERT R. TURPIN, CHRISTOPHER C. BROWN, MEMBERS OF THE PONTIAC BOARD OF EDUCATION,

*Defendants-Appellants.*

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed May 28, 1971.

Before: McCREE, Circuit Judge, CECIL, Senior Circuit Judge, and MURRAH*, Senior Circuit Judge.

McCREE, Circuit Judge. This case presents the question whether the racial pattern which is manifested within the Pontiac, Michigan School District in pupil attendance zones, faculty and administrative assignments, and the locating of school buildings is the purposeful product of policies of the Board of Education. Plaintiffs-appellees are Negro children and residents of the City of Pontiac and of the State of Michigan. On February 20, 1969, they brought a class action in the United States District Court for the Eastern District of Michigan against the school district, its superintendent and assistant superintendents, and the seven members of its Board of Education. The complaint charges that defendants have drawn zone attendance lines and have selected new school construction sites with the purpose and effect of maintaining separate schools for Negro children, and that defendants also have limited the number of Negro employees working in the school system and have considered race in assigning teachers and administrators to schools in contravention of the Fourteenth Amendment to the Constitution of the United States.

On February 17, 1970, the District Court filed its opinion finding that the Pontiac Board of Education

> . . . intentionally utilized the power at their disposal to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation within the City and thereby, deliberately, . . . prevented integration. . . . Where a Board of Education has contributed and played a major role in the develop-

* The Honorable Alfred P. Murrah, Senior Judge, United States Court of Appeals, Tenth Circuit, sitting by designation.

> ment and growth of a segregated situation, the Board is guilty of *de jure* segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil. *Davis* v. *School District of the City of Pontiac*, 309 F. Supp. 734, 741-42 (E.D. Mich. 1970).

With regard to faculty members and administrators, the court stated:

> Just as there has been failure to implement pronounced policies regarding the elmination of segregation within the school body, so too has there been a failure to provide an integrated faculty or administration within the system. The fact that the Board employs Negro faculty members when the majority of those teachers are confined to Black schools, is indicative of a practice of following and indeed advancing the segregated characteristic of the schools. A review of the testimony and exhibits made available to the Court reveals that, historically, Black teachers have been and continue to be assigned to Black schools and white teachers assigned to white schools. The fact that the Board of Education has, in an attempt to deprive the plaintiffs of any complaint in this regard, assigned one or two Black teachers to all-white schools and, vice versa, is insufficient evidence that the problem is being corrected.
>
> . . . .
>
> This Court could repeat here reams of testimony presented by the defendants to explain the situation in the teaching faculty which is presently found to exist. The record speaks for itself in this regard and warrants no magnified attention to reflect the discriminatory practices which continue to be followed in the Pontiac School System as to assignment of faculty and promotion of administrators. *Id.* at 742-43.

The court then ordered defendants to submit a plan for the integration of the school system at all levels — student body,

faculty and administration. On April 2, 1970, the court approved a plan submitted by appellants, entered an order that the plan be implemented, and granted final judgment in favor of appellees.

Appellants correctly contend that under *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), a school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not attributable to school policies or practices and is the result of housing patterns and other forces over which the school administration had no control. They also contend that the District Court's findings in this case compel the conclusion reached in *Deal* that the racial imbalance in the schools is not the result of improper discrimination by the school district. We disagree. In *Deal* this court stated that

> . . . bare statistical imbalance alone is not forbidden. There must also be present a quantum of official discrimination in order to invoke the protection of the Fourteenth Amendment. 369 F.2d at 62.

The court below clearly indicated its awareness of that requirement and found in this case the quantum of discrimination sufficient to support an order to desegregate:

> This Court acknowledges the recently enunciated position that a Board of Education has no affirmative duty to eliminate segregation when it has done nothing to create it, but this Court finds that the Pontiac Board of Education did a great deal to create the patterns presently existing within that school district and is now responsible to take action to eliminate the very situation which it caused. 309 F. Supp. at 742.

Accordingly, the principal question before us is whether there is sufficient evidence in the record to support the determination of the District Judge that appellants are re-

sponsible for the existing racial imbalance in the Pontiac School System. Appellants argue that schools have been constructed and attendance zones have been drawn in accordance with a neighborhood school concept without regard to race. They assert that, although the school district's policies were color blind prior to 1964, the Board of Education now affirmatively seeks to recruit black employees and to integrate pupils, teachers and administrators by using race as one of the criteria in determining attendance zones and assigning personnel. However, these same contentions were presented at trial and the District Court, while acknowledging recent efforts to improve the situation, nevertheless found the new policies inadequate to cure the effects of years of purposeful segregation. After a thorough review of the record on appeal, and upon consideration, we have concluded that the District Court's findings of purposeful segregation by the school district are supported by substantial evidence and are not clearly erroneous. Fed. R. Civ. P., 52 (a).

During the six-day trial, lengthy testimony was admitted concerning the policies and practices of the Pontiac school system, and numerous exhibits were introduced to illustrate the racial population patterns of the City of Pontiac and the development of school construction and attendance boundaries within the system. We observe, as did the District Court, that school location and attendance boundry line decisions, for the past 15 years, more often than not tended to perpetuate segregation. Attempted justification of those decisions in terms of proximity of school buildings, their capacity, and safety of access routes requires inconsistent applications of these criteria. Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial dis-

crimination has existed in the Pontiac school system for at least 15 years.

The court's finding that the school district's administration and faculty have been purposefully segregated finds even stronger support in the record. Appellants fail in their attempts to explain the obvious pattern of placement of black teachers and administrators almost exclusively in schools attended by black children. It is admitted that teacher placement procedures were changed in 1967 because the central office believed that principals were discriminatorily exercising their right to reject job applicants. We also observe that appellants' proposal to re-assign faculty members in the racial proportions of student bodies merely restates the Board's prior policy of personnel placement. Although the plan may result in a satisfactory level of faculty integration, the formula would not be consistent with nondiscriminatory assignment of personnel on a continuing basis. As the District Court observed, the school district's obvious regard for race in assigning faculty members and administrators is a factor which may be considered in assessing motives underlying past decisions which resulted in segregation. *United States* v. *School District 151 of Cook County*, 301 F. Supp. 201, 229-30 (N.D. Ill. 1969).

We also hold that the court properly fulfilled its duty to require the eradication of the effects of the past unlawful discrimination. As the Supreme Court stated in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968):

> We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. 391 U.S. at 438 n. 4.

In *Robinson* v. *Shelby County Bd. of Educ.*, No. 20,629,

at 4 (6th Cir. May 10, 1971) (slip opinion); and *Kelley* v. *Metropolitan County Bd. of Educ. of Nashville and Davidson County*, No. 20,741, at 10-11 (6th Cir. December 18, 1970) (slip opinion), we quoted with approval the following statement by a District Court.

> Historic zone lines which purposely promote segregation must be altered. In making such alterations defendant Board should take those steps 'which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.'
>
> All that is required of defendant in the area of zoning is that it take affirmative action to maximize integration in all feasible ways so as to promote the immediate establishment of a unitary system.

Appellants now argue that the plan which they proposed and which the District Court adopted is impractical and would require the expenditure of large sums of money which may not be available. However, the only alternative "plan" also proposed by appellants is no more than the reaffirmation of existing policies. Accordingly, we do not hold that the District Court abused its discretion in adopting appellants' comprehensive plan for the integration of the students and staff of the school system. It is initially the responsibility of the Board of Education to propose a feasible means of disestablishing existing segregation and eliminating its effects within the school system. Ordinarily, the court will not substitute its discretion for that of a board of education but will adopt a plan proposed by the board if it fulfills the board's duty to eliminate the effects of past illegal conduct. *Robinson* v. *Shelby County Bd. of Educ., supra*, at —— (slip opinion).

The District Court's judgment and order are affirmed and the case is remanded for continuing supervisory jur-

isdiction over the desegregation of the school system. Because of the length of time which has passed since the entry of the District Court's order, and the possibility that some conditions have changed within the school system during that time, the court may, in its discretion, allow the parties to submit alternative plans or propose amendments to the adopted plan, or may consider such other relief as may be appropriate.

Affirmed.[1]

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[1] Before the issuance of this opinion, the United States Supreme Court handed down its decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 39 U.S.L.W. 4437 (U.S. April 20, 1971) (Nos. 281 and 349), and its companion cases. Those cases were primarily concerned with the extent of the duties of school authorities and the scope of the powers of federal courts to accomplish the desegregation of public schools where a segregated pattern was the consequence of state action. The Court stated that:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437-438.
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, *supra*, at 4441.

We observe that the District Court's order in this case is consistent with these principles and is within the scope of its remedial powers as enunciated by the Court in the companion cases. *Accord, Johnson* v. *San Francisco United School Dist.*, (N.D. Cal. April 28, 1971) (No. C-70 1331 SAW) (slip opinion).

CECIL, Senior Judge, concurring.

The American Public School System is one of the great institutions designed by man and the neighborhood concept of limited school districts for the purpose of attendance is a major element of strength of the institution. Busing students from one school building to another, particularly for the elementary grades, is out of harmony with the neighborhood concept of our public school system.

There is no legal requirement that there be a racial balance in every school nor is it required that students be bused back and forth from one part of a school system to another to achieve such a balance. The Court said in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 39 U.S.L.W. 4437, 4444,

> "The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

At pp. 4441-42, the Court said,

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*" (Emphasis added).

See also *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (C.A. 6) *cert. den.*, 389 U.S. 847; *Northcross* v. *Memphis City Schools Board of Education*, 420 F. 2d 546, *aff.*, 397 U.S. 232. Nevertheless school authorities may not

through a pattern of zoning and school construction create a situation that will result in racial segregation. The Court said in *Swan, supra,* at p. 4443,

> "* * * The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning', further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.
>
> In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight."

See also *Kelly* v. *Metropolitan County Board of Education of Nashville, Tennessee,* 436 F. 2d 856, (C.A. 6).

In the case before us the district judge made the following findings,

> "This Court finds that the Pontiac Board of Education intentionally utilized the power at their disposal

> to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation with the City and thereby, deliberately, in contradiction of their announced policies of achieving a racial mixture in the schools, prevented integration. When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission. Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of a 'de jure' segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil." *Davis* v. *School District of Pontiac, Inc.*, 309 F. Supp. 734, 741-742.

As Judge McCree said in the opinion of the Court, these findings of purposeful segregation by the school district are supported by substantial evidence and are not clearly erroneous. Since the school authorities purposefully created a condition that resulted in segregation of races they must take such steps as are necessary to remedy the situation. If the remedy requires busing of students the school district must provide for such transportation. As the Court said in *Swan*, (sic.) p. 4446,

> "* * * In these circumstances we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school segregation."

**Donald DAVIS, Jr., a Minor by his mother and next friend, Mrs. Sadie Davis, et al., Plaintiffs;**

**v.**

**SCHOOL DISTRICT OF the CITY OF PONTIAC, INC., et al., Defendants.**

**Civ. A. No. 32392.**

United States District Court,
E. D. Michigan, S. D.
Feb. 17, 1970.

**309 F. Supp. 734**

* * *

## MEMORANDUM OPINION

KEITH, District Judge.

Plaintiffs in this action, Negro children of the state of Michigan and residents of the City of Pontiac, bring this action, through their next friends and parents pursuant to F.R.Civ.P. 17 (c) as a class action as prescribed by F.R.Civ. P. 23 (a) and 23 (b) (2) (3), against defendants School District of the City of Pontiac, its Superintendent and Assistant Superintendents and the seven members of the Pontiac Board of Education. Plaintiffs complain that defendants individually and in concert have been and are discriminating against them and denying and will continue to deny plaintiffs and the class they represent the right to be educated in the Pontiac School System under the same and equal terms as white minor residents. Plaintiffs further complain that defendants have discriminated in their hiring and assignment policies of teachers and administrators, and have invidiously considered race in assigning personnel to schools. It is the contention of plaintiffs that the above enumerated practices deprive plaintiffs of rights and pri-

vileges secured by the equal protection and due process clauses of the Fourteenth Amendent to the United States Constitution. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §§ 1331 and 1343 (3) (4); the cause of action is brought pursuant to Title 42 U.S.C. §§ 1981 and 1983.

## CONTENTION OF PARTIES

It is the contention of plaintiffs in this matter that defendants "have drawn the zone attendance lines for elementary schools which have as their purpose and/or effect the maintenance of separate schools for Negro children." (Plaintiffs' complaint.) Plaintiffs contend that the elementary, secondary and high schools within the City of Pontiac operate under a system of *de facto* segregation which has resulted from defendants' policy of shifting boundary lines and locating new schools in such a manner as to minimize the prospect of achieving maximum integrated schools. Plaintiffs assert that the racial integration policies adopted by the Pontiac Board of Education have not been pursued in good faith by the administration, but rather that the actual policy of the board has been and is knowingly to permit the existence of segregrated facilities when such could have been and could be avoided. Plaintiffs further assert that it was and continues to be the policy of the Board intentionally to place Negro instructional personnel and principals mainly in predominately Negro schools and, in addition, to limit the number of Negro employees in proportion to the existing demand for personnel in predominately Negro schools.

It is the position of defendants in this matter that historically the policy of the Board of Education has been that all pupils in the school district should attend the school which services the attendance area in which they live i. e.,

the "neighborhood school concept" without regard to race or color. This policy became expressed and was reaffirmed by a written resolution of the Board of Education on March 10, 1960. It is the contention of the defendants that the criteria for establishing attendance areas includes the nearness of the pupils to the schools, the safety of access routes, and the capacity of the schools. In 1964, an additional factor was added to these criteria, namely that "when possible" the attendance areas would be drawn so as to provide integration of the student bodies, and that integration would be a factor considered in the selection of sites for the location of new schools.

In regard to the facilities of the various schools, the defendants state that under the provisions of the negotiated contract between the Board of Education and the Pontiac Educational Association (which latter organization is exclusive bargaining representative for all teachers in the school district) transfers and changes in teaching assignments are on a voluntary basis whenever possible. In making involuntary assignments and transfers, the convenience and wishes of the individual teacher are to be considered and only after notification to the teacher, and an opportunity for the teacher to be consulted regarding the transfer may an involuntary assignment and transfer be ordered by the Board.

It is the position of defendants that school activities have always been open to all students irrespective of race, color or creed. Defendants admit the existence of a racial imbalance, but argue that such imbalance results not because of defendants policies or actions, but in spite of them — a direct result of the segregated housing pattern within the City of Pontiac. Defendants contend that true *de facto* segregation exists in certain of the elementary schools in Pontiac but that the defendants are under no Constitutional duty to undo that which it has not caused.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### FINDINGS OF FACT

The defendants in this action admit that segregation and racial imbalance exists in the Pontiac School System, and that such a situation is directly harmful to the development of those Negro children who suffer thereunder. The Court begins its decision in this matter confronted with the undisputed fact that Negro children are being deprived of quality education in the Pontiac School System and that early deprivation of innocent young children culminates in permanent, devastating, irreparable harm — harm incapable of subsequent correction. Officials of the Pontiac School System admit that these Black children are being given an inferior education, psychologically damaging to their self-image and economically damaging to their ability to perform in an adult world. To a child, segregation "reinforces the idea that he is different, separate and inferior", * * * and the cause of that segregation is irrelevant "as it would make no difference whether it be *de jure* or whether it be by circumstance * * * *de facto*", (Mr. Perdue P. 128) * the harm remains. And so, we observe a generation of children being injured by an admittedly segregated school situation — another generation receiving inferior educations and being deprived of the technical and intellectual skills that will enable them upon graduation to perform in significant positions competently and confidently. No expert need explain that frustrations such as these are often manifested in new forms of both anti-social and self-destructive behavior.

Defendants deny any responsibility for the segregated character of their schools, and argue that they have no

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* Mr. John Perdue, Director of School, Community and Human Relations, Pontiac School District.

affirmative duty to rectify a condition which they neither created nor advanced. It therefore becomes the duty of this Court to sift through the maze of incidents which contributed to the present situation; and, inasmuch as segregation admittedly exists in the school system it must be determined if and where failures or omissions on the part of defendants may have occurred and what, if anything, now can be done to halt the furtherance of an abhorrent situation for which no one admits responsibility or wishes to accept the blame. It is neither the Court's intent nor desire to place blame — that belongs to history; it is the Court's obligation and indeed its duty, where the well-being of an entire generation of children is admittedly in jeopardy, to ascertain where duty lies, if a breach of same exists or has existed, and if so, what now can be done to correct the situation.

Beginning as early as 1948, the Pontiac Board of Education unanimoulsy recognized and adopted a policy of hiring "without regard to race of color." (See Defendants' Exhibit 8). In 1954, the Board resolved that "specific boundaries shall be established for each school in the Pontiac School District" (Defendants' Exhibit 2) and publicly declared:

> "Whereas, the Board of Education of the School District of the City of Pontiac is faced with the need for an extensive program of school building construction in order to adequately provide educational opportunities for the children of this city; and
>
> Whereas, it has been the practice of the Board of Education of the School District of the City of Pontiac to construct schools in terms of the location of children to be served by those schools irrespective of race, color or creed; and
>
> Whereas, it seems necessary now to reaffirm publicly this above mentioned policy,

THEREFORE, the Board of Education of the School District of the City of Pontiac publicly declares it is the policy of this Board to locate additions to school buildings and new schools on the basis of nearness and accessibility of these facilities to the children to be served irrespective of their race, color or creed." (Defendants' Exhibit 3).

In 1955, the Board resolved to:

"Restate and reaffirm its policy to employ, upgrade and assign all applicants for administrative, teaching, secretarial, clerical, maintenance and all other position classifications within the table of organization on merit without regard to race, color, marital status, nationality or religion." (Defendants' Exhibit 9).

In 1960, the school attendant policy was again reaffirmed by the Board, wherein it was stated:

"Whereas The School District of the City of Pontiac has maintained as official policy that all pupils shall attend the school which serves the attendance area in which they live and

Whereas this policy is maintained for all pupils without regard to race, color, nationality, or religious affiliation, and

Whereas it now seems desirable to reaffirm this policy publicly,

Therefore The Board of Education of the School District of the City of Pontiac publicly declares that it is the continuing policy that pupils shall attend the school which serves the attendance area in which they live, irrespective of race, color, nationality, or religious affiliation." (Defendants' Exhibit 4).

On December 9, 1964, the Board of Education once again found it necessary and suitable to adopt a resolution wherein they stated that:

"Under our system of laws, it is the primary responsibility of each community to provide equal educational opportunities for all children in terms of quality instruction, adequacy of facilities and instructional materials, and opportunity for personal fulfillments. The latter can be accomplished to an adequate degree in our democracy only when the policies and practices of the school system place a positive emphasis upon achieving and maintaining a racially integrated school system. Providing this equity in educational opportunities is a part of the process of educational planning, done by cooperative means consistent with the basic educational philosophy of our school district.

*Pupil Placement*

Pupil placement practices of the school district must be based on sound educational principles, and should provide integrated school populations insofar as this is possible.

The neighborhood school concept is believed to represent sound educational practice. Pupils will be guaranteed the right to attend the school which serves their attendance area as established by action of the Board of Education. The Board of Education recognizes that circumstances arise occasionally wherein shifts in population necessitate the temporary provision of special housing arrangements for pupils. These may occur in the future, but do not negate the broad principle enunciated here.

The present school attendance areas have been established on the basis of the following criteria: the nearness of the pupils to school, the safety of pupil access routes to school, and the reasonable capacity of the school. At such times as changes in school attendance areas may be required, an additional criterion will be observed. When possible, the boundaries shall be drawn so as to provide integrated student bodies in schools. This added criterion will also receive consideration along with other criteria in the selection of sites for the location of new schools.

*Employment and Assignment of Teachers*

It is the continuing policy of the Board of Education to employ, upgrade, and assign all applicants for administrative, teaching, secretarial, clerical, maintenance, and all other positions within the table of organization on merit without regard to race, color, marital status, nationality, or religion.

The Board of Education believes it to be desirable that all school pupils should have the opportunity to receive instruction from white and Negro teachers during their years in school. Thus it is desirable to achieve and maintain an equitable distribution of Negro and white teachers in the various schools of the school district.

Teachers are professional persons, and as such have the right to have their views on their placement and assignment considered and respected. Furthermore, it is sound educational practice to assess the specific qualifications of each teacher, the specific needs of each position and, to the degree possible, match the qualifications of the employee to the needs of the position.

It is believed that an equitable distribution of white and Negro teachers, respect for the views of teachers with regard to assignments, and matching professional qualifications with the needs of each position can and should be achieved through appropriate inservice education, encouragement, and administrative effort.

*Educational Programs*

It is the continuing policy of the Board of Education that educational programs of excellence must be provided for all pupils in all schools. Where special educational needs are found to exist, special educational programs and services will be provided to meet these.

Text books, instructional materials, and instructional programs should be examined in light of their ade-

quacy with respect to the role and contribution of the Negro in American development, the effect of slavery and discrimination of Negroes as individuals and a group, and the implications of the civil rights movement. These emphases are essential elements in the instructional program if good intergroup attitudes and understandings are to be developed among all children, and if the Negro child is to develop a good self-image, pride in his race and heritage, and a sense of equality as a human being.

*School Facilities*

It is the continuing policy of the Board of Education to provide the best possible school facilities for all schools and all pupils."

(Defendants' Exhibt 6).

In 1967, after approximately twenty long years of nothing more than resolutions and policy statements regarding intent to strive for and achieve racial balance, the Board set its sights on the distant future and adopted a *"Long Range* plan for school improvement and the achievement of an improved racial balance in the Secondary Schools of the School District of the City of Pontiac." With this act, the Board had one more statement of policy; and the Black community had one more written promise.

It is, therefore, apparent that there has been, since 1948, a thorough recognition by the Board of Education for the School District of Pontiac of the need toward achieving racial integration among student bodies, faculties and administrators within the system. Yet, the testimony clearly reveals that in 1954 when boundary lines were first drawn designating school attendance zones, the only criteria employed in determining the zones was nearness of school, safety of access routes and capacity. Despite any pronouncements or resolutions adopted, the testimony clearly reflects that the Board of Education *never* considered achievement

of racial balance as a factor in setting the original boundaries. The testimony further indicates without question that ever since the incorporation of this fourth factor in 1964, there has been neither an attempt nor even a consideration toward modification, alteration or realignment of boundaries in light of the 1964 resolution. It follows quite logically then that achievement of racial balance has never been a legitimate factor in the setting of boundary lines. The 1964 pronouncement was made, but resulted in absolutely no realignment of existing boundary lines for the purpose of obtaining greater racial balance.

In addition, between the period of 1955 and 1964, nine new schools were also built without any consideration given toward achieving a racial mixture. The Board admits that schools were located in accord with housing development and, thereby, readily adopted the same segregated pattern; with the addition of each new school, segregation advanced — it became fixed and cemented. By 1964, no restatement or reaffirmation of previous policies, no adoption of new policies, no pronouncement of long range plans, and no realization or admission of segregation's harm to children could eliminate the segregated school pattern.

This Court is convinced, in view of the number of resolutions and policy statements outlined above, that the Board of Education for the Pontiac School District has committed itself to integration within their school system. A careful and thorough reading of the testimony in this matter, coupled with a study of prior, similar litigation regarding this matter (See Henry v. Godsell [D.C., 1958] 165 F.Supp. 87) reveals that these defendants were unquestionably aware, as early as 1954, of the import of their resolutions regarding integration, the goals to be obtained and the affirmative role they had in accomplishing those goals. It therefore becomes the duty of this Court to determine whether or not the Board of Education either implemented

or ignored their own stated policies. Pronouncements of good intentions with nothing more amounts to "monumental hypocricy." (Senator Ribicoff, February 9, 1970).

In an attempt to analyze and understand the geography of the school district serving the City of Pontiac as well as the racial composition of that city, this Court has found it necessary and helpful to carefully review the testimony of the witnesses in accompaniment with the charts and exhibits admitted into evidence. This analysis will be limited to the elementary schools within the system as the testimony has demonstrated the pattern of segregation therein most clearly.

The statistics are as follows.

The Pontiac School District incorporates approximately 39 square miles; the City of Pontiac is situated directly within that area and encompasses approximately 20 square miles; there are at present 29 elementary schools located within the district; of this number 17 of those schools are practically speaking, all white; six of those schools are all Black; and six of the schools have an integrated student body; the ratio of *Negroes to whites* within the City of Pontiac is approximately *30% to 70%;* since 1954, 10 additional elementary schools have been added to the school system; 9 of those schools were added within the period 1954 through 1963; between 1955 and 1969 the School Board has found it necessary to change the zones for boundary of its attendance areas 12 times; the testimony reveals that the changes resulted from the addition of new facilities, and were never drawn originally nor modified with isolated purpose of attempting to achieve maximum racial balance within the schools. As mentioned earlier, none of the nine schools built within the period 1955 through 1963 was located with any consideration as to achievement of racial mixture.

The additions of Alcott, Weaver and Lincoln Elemen-

tary Schools have created changes in the boundaries of Hawthorne, Owen and Wisner Schools, since 1955. The area and the schools are white.

Toward the more central area of town the additions of Mark Twain and Herrington Schools have created changes in the boundary lines of Baldwin, McCarroll, Emerson, Willis and Longfellow Schools since 1955. Prior to the addition of Twain and Herrington, children from the areas that those new schools presently serve had to travel the distance to the schools previously existing for them. At the time of their construction the new schools mentioned serviced solely white areas and were attended by whites. More recently, both Twain and Herrington have become integrated schools; their existence, however, and strategic locations allow for continued segregation of the surrounding schools of Central, Baldwin, McCarroll, Emerson and Willis Schools. But for the existence of Twain and Herrington Schools, the surrounding schools with their previous boundary lines would find themselves now integrated. Because of the existence of these two newer schools in the vicinity, the remaining schools of the area have been permitted to remain white. There has been no attempt to rearrange boundary lines within the area so as to obtain a greater degree of racial mixture even though the previous boundary lines of the older and still all-white schools nearby originally encompassed attendance areas which, if still enforced now, would allow for integration within those schools.

To the south of the business area of the City of Pontiac is found the section of town serviced by Whittier, McConnell, and Wilson Schools. It was the decision of the Board of Education in 1954 to construct the Bethune Elementary School in order to alleviate overcrowding at nearby Bagley. Even though the Webster School to the North of the Bagley School had an overwhelmingly large capacity, the Board of

Education decided to erect Bethune School so as to accommodate only the overflow of Bagley. Bethune became all Black. Webster remained all white. There was no school constructed so as to alleviate the needs of both the white Webster School and the Black Bagley School by creating an integrated school somewhere between the two. Even though other locations appeared at the time to be equally suitable to the location of the new Bethune School, and indeed other locations had been considered by the Board of Education, the school was placed in such a fashion that it was attended solely by Blacks. Bethune School was built in 1955 and became the subject matter of the litigation previously mentioned. (Henry v. Godsell, *supra*).

If this Court's attention was directed and limited solely to the location of the Bethune School without being confronted by or concerned with the total pattern which was, at the time, developing in the construction of new schools in the system, the School Board may have succeeded in providing a persuasive argument here, as it did earlier, that the location of the Bethune School could be justified on the grounds of the existing criteria, namely, nearness, capacity and safety of access routes. However, this Court's consideration is not limited or directed solely to the location of the Bethune School, but has been broadened to take into consideration the composition of the entire Pontiac School System. The prior litigation regarding Bethune School is significant as it indicates the early awareness of the Board of Education that a definite pattern of segregation was developing by their choice of locating schools. Rather than taking affirmative steps to counteract the pattern obviously developing as of 1955, the School Board, to the contrary, by its location of additional schools subsequent to 1955, assured the progression of that segregated pattern.

In 1958 the Franklin School was built so as to alleviate

the overcrowding at Whittier and Wilson; Franklin took the complexion of its predecessors, namely Black.

If sufficient evidence had not already been presented to indicate the active role of the School Board in advancing the segregated nature of the School District, attention then need only be directed to location of the Irving School, built in 1959. Originally, the area adjacent to the Bagley School area was serviced by Whitfield, an all-white school. The boundary line between Bagley and Whitfield served to effectively eliminate any possible integration of student bodies within those two schools. As mentioned earlier, the construction of Bethune alleviated any overcrowding at Bagley. Within a very short time after the construction of the new, all-Black Bethune School, it became apparent that the nearby all-white Whitfield School also was becoming overcrowded. To alleviate that situation without jeopardizing the pale complexion of the school, the Board of Education erected the Irving School. Irving School has a total attendance of 167 students; it is the smallest full elementary school within the Pontiac School system. It has been located in such a fashion as to serve solely whites. It could have been and should have been located otherwise so as to achieve the racial balance for which the Board expressly strived.

[1] This Court finds that the Pontiac Board of Education intentionally utilized the power at their disposal to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation within the City and thereby, deliberately, in contradiction of their announced policies of achieving a racial mixture in the schools, prevented integration. When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission.

Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil.

The Board of Education cannot absolve itself from responsibility for this situation when it had the power, duty and control to prevent the situation. It would be feigned modesty on the part of any Board of Education to suggest that it is controlled by a situation rather than that it can control. A decision regarding location of new schools is one for the Board as the evidence in this case amply demonstrates. For a school Board to acquiesce in a housing development pattern and then to disclaim liability for the eventual segregated characteristic that such pattern creates in the schools is for the Board to abrogate and ignore all power, control and responsibility. A Board of Education simply cannot permit a segregated situation to come about and then blithely announce that for a Negro student to gain attendance at a given school all he must do is live within the school's attendance area. To rationalize thusly is to be blinded to the realities of adult life with its prejudices and opposition to integrated housing.

[2] The question is no longer where the first move must be made in order to accomplish equality within our society; the question has become and, possibly has always been, who has the power and duty to make those moves so as to advance the accomplishment of that equality. This Court believes that the Pontiac Board of Education had and has the power and responsibility to make decisions as to locations of new schools and boundary lines so as to achieve an integrated student body. This Court acknowledges the recently enunciated position that a Board of Education has no affirmative duty to eliminate segregation

when it has done nothing to create it, but this Court finds that the Pontiac Board of Education did a great deal to create the patterns presently existing within that school district and is now responsible to take action so as to eliminate the very situation which it caused. The harm to another generation of Black children while awaiting implementation of "long-range plans" to integrate simply cannot be tolerated, and no degree of expense is unbearable when placed along side of the unbearable situation which exists for those Black children. The safety and well-being of children in life involves more than the access routes in reaching school.

This Court believes in quality integrated education for all children. As early as 1958 the Superintendent of the Pontiac School System, Dr. Dana P. Whitmer, expressed similar beliefs and manifested a thorough awareness of the problems and goals when he stated:

> "As a result of my own experience in Pontiac, and in Gary and previously, as well as my own study of this major problem which we face in our country, I feel that segregation, sanctioned in a school district, for example, is both abhorrent and illegal. Certainly if in this country we are to achieve in reality the ideals and principles on which it was founded, segregation, which prevents the natural and normal association together of people of varying ethnic, religious and racial backgrounds, must not be sanctioned in this country. And, consequently, in the discussions with the Board of Education of the School District of the City of Pontiac we have attempted continually to take such action as would not segregate the schools." (See Henry v. Godsell, *supra*, 165 F. Supp. p. 91).

Just as there has been failure to implement pronounced policies regarding the elimination of segregation within the school body, so too has there been a failure to provide an integrated faculty or administration within the system.

The fact that the Board employs Negro faculty members when the majority of those teachers are confined to Black schools, is indicative of a practice of following and indeed advancing the segregated characteristic of the schools. A review of the testimony and exhibits made available to the Court reveals that, historically, Black teachers have been and continue to be assigned to Black schools and white teachers assigned to white schools. The fact that the Board of Education has, in an attempt to deprive the plaintiffs of any complaint in this regard, assigned one or two Black teachers to all-white schools and, vice versa, is insufficient evidence that the problem is being corrected.

For example, Alcott School has a total enrollment of 608 students, 605 of which are white; Alcott has no Black teachers. Emerson School has an enrollment of 656 students all of whom are white; Emerson has one Black teacher. Weaver School, Whitfield School, Wisner School, Malcolm School and Willis School all have a white student body; each has one Black teacher. Other all-white schools have, at most, two Black teachers. Whittier School, an all Black School, has two white teachers.

[3] This Court could repeat here reams of testimony presented by the defendants to explain the situation in the teaching faculty which is presently found to exist. The record speaks for itself in this regard and warrants no magnified attention to reflect the discriminatory practices which continue to be followed in the Pontiac School System as to assignment of faculty and promotion of administrators. Segregation of faculties alone is sufficient for a finding that discrimination as to race has occurred in the Pontiac School System and that the Board is guilty of *de jure* segregation; the fact that a teacher must be consulted pursuant to contract prior to any transfer does not negate the fact that the Board has the power to effectuate transfers so as to assure quality education.

In this regard, Mr. William Lacy, Assistant Superintendent for Instruction and School Organization, testified that "it's my position that it is important that children receive instructions from both Black and White teachers during their public school careers. I feel that children who are being prepared to work and live need to know something about minority groups and in Pontiac the Black and white groups are of particular importance; and if a child, a white child receives instructions from a Black teacher, I think this enables him to form opinions of Black — about Black people that might be different from what he had previously had." "* * * The interests of the child is always primary" to that of the teacher. (Pp. 105-106).

Yet, despite this "primary interest" in the children, Mr. John Perdue, Director of School, Community and Human Relations acknowledged, as to integration of faculties, "(t)here have been some things that have been accomplished within the last two years that would indicate that the policy has been followed. * * * Prior to the last two years, no, I would say absolutely no, because I see no evidence of what we are trying to — of Black people in certain places." (Mr. Perdue, P. 150). It was the testimony of Dr. Whitmer that there would be no monumental cost in transferring teachers so as to achieve the racial balance which the many resolutions recognize as necessary.

[4] In view of the racial imbalance which obviously exists in the faculties of the Pontiac School System, it is incumbent on the defendants herein to prove that such did not result from discriminatory practices on their part. This the Pontiac Board of Education has failed to do. See Chambers v. Hendersonville City Board of Education (4 Cir., 1966), 364 F.2d 189. Rolfe v. County Board of Education of Lincoln County, Tennessee (6 Cir., 1968),

391 F.2d 77. As stated in Wheeler v. Durham City Board of Education (4 Cir., 1966), 363 F.2d 738:

> "The locus standi of pupils and parents to question faculty assignments was conclusively declared in Bradley v. School Board, supra, 382 U.S. 103, 86 S.Ct. 224, [15 L.Ed.2d 187]. We read the decision as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in Brown v. Board of Education, supra, 347 U.S. 483, [484], 74 S.Ct. 686, [98 L.Ed. 873]. Hence no proof of the relationship between faculty allocation and pupil assignment was required here: The only factual issue is whether or not race was a factor entering into the employment and placement of teachers."

## CONCLUSIONS OF LAW

[5, 6] Based on the above findings, it is the opinion of this Court that the Pontiac School Board cannot use the neighborhood school concept as a disguise for the furtherance or perpetuation of racial discrimination when they participated in the segregated policy. (See Deal v. Cincinnati Board of Education [6 Cir., 1969] 419 F.2d 1387.) The policies and practices of school officials or their predecessors in the past, when amounting to *de jure* segregation, cannot be overlooked and ignored even though there may be a present day resolution in complete contradiction to prior practices. If school officials discriminated at any time on account of race and thereby created an unfair situation the effects of which presently persist, then the present day officials have an immediate obligation to overcome the effects of past discriminatory acts when such acts resulted in *de jure* segregation. See United States v. School District No. 151 (D.C., 1969), 301 F.Supp. 201.

[7-9] Once it has been demonstrated as it has in this case that attendance lines were consistently drawn in such a fashion so as to discourage achievement of integration when such need not have occurred, the presumption can be made that the results reached were intended. When school officials have located new schools in such a fashion as to intensify racial imbalance, then the resulting situation is *de jure* segregation and they have the duty to eradicate the results of their discriminatory acts. See Dowell v. Board of Education (1969) 396 U.S. 269, 90 S.Ct. 415, 24 L.Ed.2d 414. Where attendance lines have been drawn in such a way as to effectuate segregation and could be redrawn in such a way as to implement integration the latter policy must be followed immediately.

[10] The right of all school children to obtain equal educational opportunity is of "paramount importance" (See Alexander v. Holmes. County School Board [1969] 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19) and cannot be subordinated even to criteria of nearness, safety of access routes, or capacities of the schools.

[11] Where placement of teachers has been made and continues to be made based on race and such placement contributes to the segregated characteristics of the schools, officials are obligated, under the Fourteenth Amendment, to make equitable distribution of teachers and administrators. Failure to do so deprives students of the right to be free of a situation by which their school is racially identifiable. (See Kelley v. Altheimer, Ark. Public School Dist. [8 Cir., 1967], 378 F.2d 483.)

[12] Having purposely allowed such a situation to exist among its faculty members, the Pontiac Board of Education has the duty to modify and relocate teaching faculties so as to achieve a satisfactory racial balance, and such objective cannot be made contingent upon the willingness or unwillingness of a teacher to transfer voluntarily. (See

United States v. Board of Education of City of Bessemer [5 Cir., 1968], 396 F.2d 44; Monroe v. Commissioners of City of Jackson [6 Cir., 1967] 380 F.2d 955). Once it has been shown that most Black teachers are assigned to Black schools and most white teachers to white schools, it then becomes the burden of the Board of Education to show that such assignments were not racially motivated. (See Chambers v. Hendersonville, *supra*). In the absence of such a showing it is incumbent upon the Board to relieve the segregated situation found among the faculty members and administrators. A segregated faculty is indicative of a segregated school district.

## ORDER

### I

Based on the findings of facts and conclusions of law heretofore enunciated — it is the ORDER of this Court that the Defendant Pontiac School District integrate its school system at all levels, student body, faculties and administrators, before the beginning of the school year of September, 1970.

### II

[13] The Pontiac School District is further ordered to submit, for the Court's approval, on or before March 16, 1970, a comprehensive plan for the complete integration of the entire school system. Such integration shall be accomplished by the revising of boundary lines for attendance purposes, as well as by busing so as to achieve maximum racial integration.

In this regard the school district may find it helpful to seek out the advice of the Department of Health, Education and Welfare. No final judgment will be entered in this matter until such time as this order has been implemented.

**Shannon Marguerite HENRY, by Marilyn Ann Henry, her next friend, individually and for all members of her class similarly situated, Plaintiff,**

**v.**

**Walter GODSELL, Louis H. Schimmel, Lola King, Glenn H. Griffin, Robert Oliver, Monroe Osmun, and J. Allen Parker, individually and as members of the Pontiac School Board, Defendants.**

**No. 14769.**

United States District Court
E. D. Michigan, S. D.

Aug. 12, 1958.

**165 F. Supp. 87**

LEVIN, District Judge.

Plaintiff, a minor and a Negro, by her mother as next friend, brings this action for injunctive relief and damages in behalf of herself and others similarly situated, against the defendant School Board and its members, pursuant to the provisions of the Civil Rights Act, 28 U.S.C. Section 1343, Subsections (1) and (3).[1] It is her claim that the

[1] "§ 1343 Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

defendants have violated the Civil Rights Act by maintaining a segregated school system and requiring her to attend a segregated school in violation of the mandate of the Supreme Court. Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.[2]

No contention is made that the alleged discrimination is sanctioned by state law which should be declared unconstitutional. Segregation in public schools has been prohibited by statute in Michigan since 1967.[3]

Plaintiff alleges that segregation has been accomplished by constructing a new school in an area occupied almost exclusively by Negroes; by altering and modifying attendance areas so that the population of certain schools is almost exclusively Negro; by establishing a new primary school district which requires her and others to transfer to the new school; and by refusing to permit her to attend a public school of her own choice without regard to the attendance area or district in which she resides.

The defendants admit that a school was built in an area occupied almost exclusively by Negroes; that attend-

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[2] For a scholarly discussion of Brown v. Board of Education and its implications see Professor Paul G. Kauper, "Segregation in Public Education, The Decline of Plessy v. Ferguson," 52 Michigan Law Review, 1137.

[3] S.L.1867, Volume I, Page 43, provided in part that: "All residents of any district shall have an equal right to attend any school therein. Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient."

In 1869 in People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400, the Supreme Court of Michigan, speaking through Justice Cooley, held that this act prevented the Board of Education of the City of Detroit from excluding or making any regulation that would exclude any resident of the district from attending any school because of race, color, or creed.

A substantially similar provision is embodied in the present school code. Section 355 of the School Code of 1955, Comp.Laws Supp. 1956, § 340.355, M.S.A. § 15.3355.

ance areas were altered; that a new primary school district was established which required the plaintiff to transfer to the new school; and that she has been refused permission to attend a public school of her own choice; but deny, in all of this, any purpose to establish or maintain a segregated school system.

In addition to the oral testimony of witnesses, more than forty exhibits, consisting of aerial maps, charts, graphs and official records of the school district, were received in evidence; all with reference to population distribution and school districting in the areas with which we are here concerned.

The school district of Pontiac includes the City of Pontiac, Michigan, parts of six adjoining townships, the City of Sylvan Lake and the Village of Lake Angeles. The present estimated population of the City of Pontiac is 85,000 of which Negroes number about 11,000.

The Board of Education, prior to the institution of this suit, did not keep statistics as to the colored and white composition of the school population. At my suggestion, a survey was taken which reveals that Negro children are enrolled in and are attending 17 out of 31, or over half of the public schools located in the various attendance areas. Provided only that a child's legal residence is within the attendance area prescribed for a school it has been the practice of the Pontiac school district to enroll that child in such school without regard to color. At the present time there is only one high school in the Pontiac school district, and this high school is attended by students of both races. A second high school is now under construction and the school authorities have stated that any student residing in that attendance area will be enrolled.

The enrollment of the Pontiac school district has increased from 13,734 in 1946 to 18,807 in November 1957. It is estimated that by 1965 the school enrollment will

nearly double the 1946 enrollment. It is conceded by the plaintiff that the Pontiac school system is overcrowded. To alleviate this overcrowded condition and to provide for the expected growth in school population, the Board of Education authorized the construction of additional schools and the modernization and enlargement of existing facilities. Since 1954 six new schools have been constructed. In 1953, as part of this plan, the Board decided to build a new elementary school to accommodate the more than capacity enrollment in schools serving the southwest quadrant of the city where by far the largest number of the Negro families is concentrated. Two sites were under consideration for this new school, namely, the so-called "Lake Street" and "Golf Drive" sites.

The Lake Street site, which was ultimately approved, is located in a densely populated area within a radius of half a mile from the homes of the children who attend the school. The children are subjected to no safety hazards in their approach to the school. As a suitable location for a new school, the Golf Drive site suffers by comparison. There is an absence of any sizeable concentration of population near that site. It is located 1.6 miles from the nearest home of the children of the area who need to be served and is separated from the population area to be served by a lake, a large swamp area, and a municipal golf course. There are no streets that directly connect the site and the residences of the children who would attend the school. The site is accessible only by travelling a circuitous route and crossing an arterial highway. The dangers to which children of tender years would have been exposed are readily apparent. On October 13, 1954, the Board decided to build on the Lake Street site. The new school was ready for occupancy at the beginning of the September 1955 term and is now populated almost exclusively by Negro children.

Plaintiff has suggested that the difficulties presented by the Golf Drive site could have been overcome either by building a causeway to provide a direct route to the site or by furnishing transportation between the site and the homes of the children. The Board of Education does not have the authority to construct roads, bridges or sidewalks. To provide transportation services would be costly, requiring the expenditure of funds that are needed to expand educational facilities.

[1-3] The school board has a duty to provide educational facilities to all children without regard to their color. If it builds schools in areas where need exists, without arbitrarily fixing attendance areas to exclude any given segment of the school population, it is carrying out that duty. It may consider such factors in selecting sites that it considers relevant and reasonable and, in the absence of a showing that the standards for selection are not relevant and reasonable and that in reality they were adopted as a sham or subterfuge to foster segregation, or for any other illegal purpose, their use is within the administrative discretion of the school board. The fact that in a given area a school is populated almost exclusively by the children of a given race is not of itself evidence of discrimination. The choice of a school site based on density of population and geographical considerations such as distance, accessibility, ease of transportation, and other safety considerations, is a permissible exercise of administrative discretion. The selection of the Lake Street school site was based upon these factors and the standards observed were not adopted as a device to circumvent the law.

[4] Plaintiff also alleges that some attendance areas in the school district were altered in 1955 to compel or achieve segregation. This allegation is devoid of merit. The Board of Education has altered and modified attendance areas from time to time to accommodate changes in popula-

tion and as a result of the erection of new schools and additions to existing schools. The changes in attendance areas that were made in 1955 were in response to the building construction that was then taking place. In the absence of a showing that attendance areas have been arbitrarily fixed or contoured for the purpose of including or excluding families of a particular race, the Board of Education is free to establish such areas for the best utilization of its educational facilities. Michigan Statutes Annotated, Sec. 15.3589.[4] The evidence establishes that the same permissible considerations that served as a basis for selecting new school sites were employed in fixing school attendance areas.

The plaintiff has no constitutionally guaranteed right to attend a public school outside of the attendance area in which she resides. The utter chaos that would prevail if each child were permitted to choose the school that he or she desired to attend without regard to the attendance area in which the child resides is readily apparent. It was a proper exercise of the Board's power to transfer plaintiff and others similarly situated to the Lake Street school when that school was designated to serve the area resided in by these children.

A few students, because of special circumstances, are permitted to attend a school not in their attendance area. Such permission is granted by the school authorities upon a proper showing, based on their established standards. It conclusively appears from the testimony that the standards applicable for special transfer, which do not include any considerations of race, have been adhered to in every respect.

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[4] M.S.A. § 15.3589 provides that "Every board is authorized to establish attendance areas within the school district." Comp.Laws Supp. 1956, § 340.589.

Nowhere in the record of this case is there any evidence tending to support the plaintiff's claim of a conspiracy to deprive her of her constitutionally guaranteed rights.

The solicitude of the parents of the young child whose rights are asserted here for an education "on equal terms"[5] with all other children has been forcefully presented by her father who appeared as counsel. In view of the serious charges made against those responsible for public education in Pontiac, it is proper to set forth their stated views on the subject of segregation as gleaned from the testimony, and some other pertinent factors of the operation of the Pontiac school system.

Dr. Dana P. Whitmer, the Superintendent of Schools, wrote his doctoral thesis on the problems of inter-group education in the public schools. He said he believes that segregation is inimicable to the democratic way of life. In his testimony before me he stated:

> "As a result of my own experience in Pontiac, and in Gary and previously, as well as my own study of this major problem which we face in our country, I feel that segregation, sanctioned in a school district, for example, is both abhorrent and illegal. Certainly if in this country we are to achieve in reality the ideals and principles on which it was founded segregation, which prevents the natural and normal association together of people of varying ethnic, religious and racial backgrounds, must not be sanctioned in this country. And, consequently, in the discussions with the Board of Education of the School District of the City of Pontiac we have attempted continually to take such action as would not segregate the schools."

Glenn H. Griffin, the President of the Board of Education, and other Board members expressed similar views.

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[5] The quoted words are those of Chief Justice Warren in Brown v. Board of Education.

The record convincingly establishes that the philosophy expressed by those witnesses has been carried into operation by the Pontiac Board of Education. That the policies of the Board of Education were not motivated by racial considerations is attested by the following facts:

The Board of Education employs teachers on the basis of character, competency and training without regard to color. Approximately 10% of the teachers in the school system are Negroes. White and Negro children in the district participate on a non-segregated basis in such day and night school activities as athletics, band, dramatics, debating, school clubs, dances, choruses and festivals. The 1957 high school varsity football team consisted of 24 Negro members out of a total of 55. White and Negro children mingle freely in lunch rooms and on playgrounds, and in classes for retarded and handicapped children there is no evidence of discrimination as to race.

The plaintiff has failed to present a case for any relief by this Court and an order dismissing the complaint may be submitted for signature. No costs will be allowed.

**Tina DEAL, a minor by Frank L. Deal, her father and next friend, et al., Plaintiffs-Appellants,**

**v.**

**The CINCINNATI BOARD OF EDUCATION et al., Defendants-Appellees.**

**No. 19210.**

United States Court of Appeals
Sixth Circuit.

Dec. 9, 1969.

**419 F.2d 1387**

WEICK, Circuit Judge.

In the first appeal which involved a claim of alleged de facto rather than de jure segregation, we affirmed the judgment of the District Court on the issue of racial imbalance, holding that the Board of Education was not required by the Constitution to bus Negro or white children out of their neighborhoods, or to transfer classes, for the sole purpose of alleviating racial imbalance which was not caused by any act of discrimination on the part of the Board but resulted from the racial concentrations in the neighborhoods in which the schools were located, and further, that the Board had no like duty to select new school sites solely in furtherance of such a purpose. We further hold that the findings of fact adopted by the District Court with respect to racial discrimination in specific schools and programs were too general to afford an adequate basis for review of those issues. We remanded the case to the District Court —

> "* * * for further findings on the issues of claimed discrimination in specific schools and programs and

> claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer."

Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), affirming 244 F.Supp. 572, cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967).

On the remand Circuit Judge Peck sat as District Judge by designation because he had presided at the original trial. He held a pretrial conference to consider the programming of the proceedings on the remand. Plaintiffs took the position that new evidence of occurrences which had transpired since the first trial should be introduced. The Board contended that on the remand the issue was limited solely to adoption of supplementary findings of fact with respect to claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, which could be determined from the original record.

Judge Peck indicated that although he had doubt as to the admissibility of evidence of subsequent events under the terms of the remand, he suggested, and it was agreed by the parties, that plaintiffs set forth their claims formally either by tendering a second amended complaint or by seeking pertinent information by discovery procedures so that the matter could be adjudicated by the Court.

However, after the lapse of six months, and because the plaintiffs failed to take any action whatsoever, the Judge notified all counsel that he interpreted plaintiffs' inaction as an abandonment of any intention to supplement or attempt to supplement the record with additional evidence, and he invited counsel on both sides to submit suggested supplemental findings, which they did simultaneously. On September 30, 1968, Judge Peck filed a memorandum

opinion and subsidiary findings of fact, a copy of which is appended hereto.[1]

The plaintiffs filed a notice of appeal, which stated in part:

> "* * * [P]laintiffs above named, hereby appeal from the memorandum and subsidiary findings of fact entered September 30, 1968, affirming the original judgment rendered on the 9th day of August, 1968."

At the outset, appellees stated in their brief:

> "There is a question as to whether or not this appeal was properly taken, because the District Court did not file an appealable order on September 30, 1968, and the only order from which the appeal is being taken was entered on the 9th day of August 1965. This order already has been reviewed.*

It is not understandable why appellants did not ask the District Judge to enter judgment on his memorandum and subsidiary findings of fact, as the entry of a judgment thereon would have eliminated any question about our jurisdiction.

If the District Court had not entered judgment on its original opinion and findings, we would have no hesitancy in dismissing this appeal for lack of jurisdiction. But judgment was entered by the District Court on its original findings, and in the appeal which followed we did not

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[1] The memorandum opinion and subsidiary findings of fact stated: "* * * [T]his court's findings of fact are those set forth in the original opinion (244 F.Supp. 572) and herein, read together."

> "* An appeal does not lie from findings of fact or from a memorandum opinion. Childs, et al. v. Ball Bros. Trucking Co., [5 Cir.] 193 F.2d 134; Rardin v. Messick, [7 Cir.] 78 F.2d 643; Breeding Motor Freight v. RFC, [10 Cir.] 172 F.2d 416." (Br., p. 4)

disturb the judgment but affirmed it on the issue of racial imbalance and remanded only for subsidiary findings to aid us in the review of other issues with respect to discrimination in specific schools and programs, which we had not decided. Although we did not expressly retain jurisdiction, it could be argued that we did so by implication.

The District Court has completely complied with our order of remand, and the record and files have been docketed in our Court under the number of a new appeal, although they could have been filed in the first appeal.

The parties have briefed the issues on the merits. No motion to dismiss the appeal has been made. We will therefore consider and decide the issues left undecided in the original appeal. In so doing, we eliminate any further delay of this litigation, which already has been pending too long in all of the federal courts.

Upon the remand, the District Court properly made findings only on the specific issues referred to him in the mandate of this Court. Appellants had urged that the Court reconsider the entire case and adopt conclusions of law inconsistent with our opinion in the first appeal. This it declined to do.

The basic issue in the case was whether the Board had a constitutional duty to establish a program to balance the races in the Cincinnati School System. We dealt with this issue extensively in our opinion in the first appeal and held that there was no such duty where the imbalance had resulted from racial concentrations in the school neighborhoods and not from any act of discrimination on the part of the Board. We were of the belief that the Constitution prohibited enforced segregation but did not require forced integration. 369 F.2d 55. In so holding we followed appellate decisions in the Tenth and Seventh Circuits. Downs v. Bd. of Educ. of Kansas City, 336 F.2d 988

(10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965); Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964). See also decisions of the Second and First Circuits in Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967), and Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); *cf.*, Mapp v. Board of Education of Chattanooga, Tenn., 373 F.2d 75, 78 (6th Cir. 1967).

Appellants petitioned the Supreme Court for certiorari in the first appeal and it was denied. Certiorari was also denied in *Downs and Bell, supra.* The denial of certiorari in the present case ought to constitute our opinion in the first appeal as the law of the case, but appellants contend that the law has been changed by the recent decisions of the Supreme Court in Green v. County School Bd. of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); Raney v. Bd. of Educ. of Gould School District, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968); Monroe v. Bd. of Comm'rs of City of Jackson, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

[1] In our opinion, these three decisions did not change any law applicable to our case and appellants' reliance on them is misplaced. The gist of the holdings in these cases was that in desegregating a dual school system, a plan utilizing "freedom of choice" or a variant "free transfer" is not an end in itself and would be discarded where it did not bring about the desired result.

On the other hand, our case involves the operation of a long-established unitary non-racial school system — just schools where Negro as well as white children may attend in the district of their residence. There is not *an iota* of evidence in this record where any of the plaintiffs or any of the class which they represent, was denied admission to a school in the district of his residence.

[2] It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty.[2] Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races.[2a]

It was more than eighty-two years ago that the Legislature of Ohio abolished segregation in the public schools.

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[2] In the Civil Rights Statute, Congress has expressed itself rather clearly on this subject in 42 U.S.C. §§ 2000c, 2000c-6 and 2000c-9. Section 2000c, in defining desegregation, provides:

> "• • • [B]ut 'desegregation' shall not mean the assignment of students to public school in order to overcome racial imbalance."

Section 2000c-6 provides:

> "• • • [T]hat nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

Section 2000c-9 provides:

> "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

[2a] The bussing required to alleviate racial imbalance would not only involve the expenditure of large sums of money for buses and drivers, but also, and of more importance, would expose the children so transported to the risk of personal injury, and their parents might well object to their assuming such unnecessary risk.

84 Ohio Laws 34, enacted February 22, 1887. The Supreme Court of Ohio upheld and enforced the law in the following year. Board of Educ. v. State, 45 Ohio St. 555, 16 N.E. 373 (1888). After enactment of this statute, the Cincinnati Board of Education promptly discontinued compulsory segregation in its school system, and ever since that time Negro children have had the opportunity to attend the neighborhood schools in Cincinnati on the same basis as white children living in the same locality. In the 60th Annual Report of the Public Schools of Cincinnati for the School Year ending August 31, 1889, it is stated:

> "An increasing number of colored pupils are attending the Common Schools. They are in the schools in nearly every building in the city and their presence no longer causes comment. They are kindly treated and are making good progress in their studies."

The neighborhood school plan for the location of public schools in Ohio is provided for by statute, which requires School Boards to —

> "* * * provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be convenient for the attendance of the largest number thereof." Ohio Rev.Code § 3313.48.

It is not questioned that the state legislature had the constitutional right and power to enact this statute.

In our opinion in the first appeal, we said:

> "The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil

placement and administration through the use of neutral, easily determined standards, and better home-school communication." (369 F.2d at 60)

Appellants contend that housing patterns in Cincinnati are segregated as a result of actions of both public and private agencies, and that the School Board "may not close its eyes to this reality" but should remedy it.[3] We are not told how or by what lawful authority the School Board can remedy the housing patterns of a neighborhood. Perhaps what appellants want is for the Court to order the Board to provide buses to transport children to other school districts where they do not reside, construct additional schools in such other districts where necessary to accomplish this purpose, and abandon the existing neighborhood schools. We find no basis to enter any such order.

We dealt with this same issue in the first appeal, and pointed out:

"The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev.Code § 4112.01-.07." (369 F.2d fn. 4 at 60-61)

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[3] This contention assumes that except for the action of the public and private agencies, significant numbers of Negroes would have the desire and the means to move out of their neighborhoods.

Boards of Education can hardly be blamed or held responsible for neighborhood residential patterns.

[3] In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. Nor should such burden be saddled upon the owners of real property who are taxed in Ohio to provide funds for the operation of public schools. Appellants should invoke whatever remedy they have against the agencies which committed the alleged wrongs of which they complain. These agencies were not made parties to this case.

The District Court adopted eighteen findings of fact dealing with specific schools and programs which appellants complained were formulated to promote or perpetuate segregation in the public schools of Cincinnati. Contrary to appellants' contention, the Court found that the schools and programs were not formulated for any such purposes and that school zone lines were not gerrymandered to exclude Negroes from certain schools.

The Court found a high correlation in the distribution of Negroes throughout the school system to the general neighborhood residential patterns. There were many areas, formerly predominately white, which were changed to predominately Negro by the movement of Negroes to the neighborhoods, and this was reflected in the increase in the number of Negro children attending the schools there.

Virtually every possible proportionate combination of Negro and white students exists in some schools in Cincinnati and the proportions are not constant. In a short period of time in which there had been no change in school zone lines, twelve Cincinnati schools changed to a heavy concentration of Negro pupils.

In Northcross v. Bd. of Educ. of City of Memphis, Tenn., 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810, we outlined the minimal requirements for non-racial schools:

> "Minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right." *Id.* at 823.

These requirements were met in the present case.

The Court found that topographical characteristics of the City of Cincinnati, combined with man-made barriers such as railroads, highways and expressways, compel the use of irregular boundary lines in composing the various school districts.

In the selection of school sites the Board had to take into account a number of factors. It was required to comply with the Ohio statute, Ohio Rev.Code § 3313.48, by selecting locations in areas of the heaviest concentration of children. Even in the absence of such a statute, it would seem prudent to locate the schools where they will be easily accessible and convenient to most of the children and without the necessity of bussing the children or their crossing dangerous thoroughfares. The Board should consider locations in areas that are being developed where large population increases are anticipated, and locations in areas where the Board already owns property. We find no abuse of discretion in the location of the schools. Nor do we think that we should tell the Board where to locate schools in the future.

[4] Federal Courts are ill-fitted to instruct Boards of Education where to select school sites, draw zone lines, or how to operate the public schools. We should intervene only where there has been a clear invasion of constitutional rights, and in our judgment that has not occured here.

The Court placed little credence in the testimony of two expert witnesses who were professors at Antioch College, in Yellow Springs, Ohio, and at Washington University in St. Louis, respectively. The Court stated that the professors—

> "* * * agreed that any deleterious effects that may have been attributed to a racially imbalanced school could, with equal probability, have been caused by preschool age family influences, neighborhood social environment, the family's economic status, and other socio-economic forces concededly beyond the control of defendants. Neither witness could explain why one 100% Caucasian school was being over-achieved by each predominately Negro school in the Cincinnati system in a way that was consistent with their primary assertions." (Supp. App. 30)

The District Court found that the testimony of the experts did not make an issue calling for rebuttal. The Court was not bound by their testimony. It found no deprivation of equal educational opportunity.

[5] There may be a reasonable basis for inferring harm to Negro or white children who are the victims of discrimination; however, as we have pointed out, the Court found against the plaintiffs on the factual issues of discrimination, and that no harm resulted. We agree that the evidence supports these findings. There is no basis for our inferring harm to anyone.

[6] Appellants further complain of discrimination in hiring and assigning of school personnel. As of 1964-65, Negroes comprised 626.5 or 21.20% of the teaching staff. We find no evidence of discrimination. There was no constitutional duty on the part of the Board to balance the races in teachers' employment and assignments. Teachers should be selected primarily on the basis of merit.

It appears from the evidence that the Board has en-

deavored to integrate its staff and had achieved a reasonably balanced staff in each school. Superintendent Pierce testified:

> "The policy of balancing a staff is that you take each individual school, and you want to be sure that you have distribution in age, distribution in sex, distribution in all qualities that make for a well-rounded staff. In that particular instance race becomes like any personality characteristics of the individual." (81a)

Superintendent Pierce further testified that in determining assignments—

> "Racial balance is a consideration, however, it is based upon the best person for that particular job, and sometimes we don't put a Negro in a school because of that reason, he is not the best person for that." (82a)

[7] There is no evidence in the record that the Board assigned teachers or other staff members on the basis of race. The evidence demonstrates the contrary, namely, that the Board was actively attempting to integrate its staff at all levels, and that to do so it had to consider the race of the person to be assigned.

Appellants claim that Dr. Phillip Rothman's study of statistics of predominately Negro and predominately white populated schools reveals that the children in the predominately Negro schools were receiving an inferior education because they had: (1) more substitute teachers; (2) less qualified teachers with fewer degrees; (3) more temporary classrooms in use; and (4) more overcrowded schools. They claim that all of these factors allegedly combine to inhibit the child's learning process. The trouble is that Dr. Rothman's opinion lacked evidentiary support. Dr. Rothman based it on his examination of certain records. He was not familiar with the Cincinnati

School System. The overcrowding was not limited to schools attended predominately by Negroes, but existed also in schools attended predominately by white pupils. The cause of overcrowding in some of the schools was actually due to the mobility of the Negro population, over which the Board had no control.

The District Court found:

> "There is no inequality of educational facilities based upon racial classification of students in the Cincinnati Public Schools."

[8] In our judgment, this finding is supported by substantial evidence and is not clearly erroneous.

The Co-Op Training Program is a program in which local industries hire students and give them job training. Appellants argue that the Board sanctioned the discriminatory practices of industries which hired white students but refused to hire Negro students. Superintendent Pierce testified that it was more difficult to place Negroes in the jobs than white students. Appellants interpret this statement as sanctioning discrimination by a public agency.

A further reading of Superintendent Pierce's testimony reveals the following exchange:

> "Q. Have you stopped dealing with the corporations that discriminate?
> A. Yes." (110a)

[9] Pierce never denied that the Board had difficulty in placing Negroes and that in many areas there were more whites than Negroes working. However, the Board cannot be held responsible for the conduct and practices of local industries of Cincinnati. The Board simply tried to place students where it could, and when it encountered discrimination it refused to do business with the companies which discriminated.

The District Judge did not make a specific finding of fact on this issue but found generally that the Board had not engaged in any discriminatory practices.

[10] Having reviewed the appellants' evidence, we are of the opinion that the Board did not sanction discriminatory practices by local industries in the administration of its Co-Op Program.

Appellants' representatives spent about two and one-half years pouring over the books and records of the Cincinnati School System in an effort to find something that was wrong. Appellants offered in evidence 286 joint exhibits, 21 plaintiffs' exhibits, stipulations, answers to interrogatories, and testimony of witnesses. One stipulation agreed upon by the parties contains seventy-one pages. In lengthy briefs appellants complaint about almost everything in the operation of the Cincinnati School System.

The amended complaint is in form commonly used in actions for desegregation of dual school systems, where the Board is asked to submit a plan for desegregation. It is totally inappropriate here, where desegregation took place eighty-two years ago. We find no good reason for disrupting the operation of the Cincinnati School System.

It is not necessary for us to rule on the so-called "Voluntary Schools" which had been established at the request of Negroes but which no longer exist, or on other programs and practices which were discontinued prior to the filing of this lawsuit.

The District Court in two hearings found against appellants on the factual issues of the case. In our judgment, the findings of fact of the District Court are supported by substantial evidence and are not clearly erroneous. Its conclusions of law are correct.

Affirmed.

# APPENDIX

## MEMORANDUM AND SUBSIDIARY FINDINGS OF FACT

(Filed September 30, 1968)

Following the entry of judgment herein after the sustaining of defendants' motion therefor at the close of plaintiffs' case, they perfected an appeal. The judgment thereafter entered in the Court of Appeals contained the following language:

> "* * * It is now here ordered and adjudged by this Court that the judgment of the * * * District Court in this cause be and the same is hereby affirmed on the issue of racial imbalance not intentionally caused by the Board, and the case is remanded for further findings on the issue of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer.*

Following the remand, a chambers "conference to discuss the programming of the further proceedings" was held with all of counsel present. It will be recalled that the record in this matter consists of extensive stipulations, hundreds of pages of exhibits and all of the evidence presented by plaintiffs at the trial. Against that background, the chambers conference was opened by our asking counsel "[W]hat area of proof you would suggest is available which is not already contained in the record that exists in the District Court?" In response, counsel for plaintiffs indicated their desire to supplement the record with evidence of "new school construction [which] has added to segrega-

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* Plaintiffs' motion for certiorari was denied October 9, 1967 (389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114)."

tion in Cincinnati," and a reluctance "to begin the process of winding our way up to the Supreme Court and have a case get there on 1964 facts." We indicated doubt as to the admissibility of evidence of occurrences and developments subsequent to those alleged as creating plaintiffs cause of action in this manner: "We certainly recognize that at the very least litigation in this day and age is recognized as a proper vehicle for social reform. That's really what we are talking about here. But the fact remains that this does continue to be litigation and for that reason I would assume that the vehicle has to be kept on tracks established by the general rules of litigation. Since that's true, how is it possible within the confines of a rather narrow and restrictive mandate to in effect try a new law suit?"

At the conclusion of a full discussion of that question, at the suggestion of the Court it was agreed that plaintiffs' counsel would attempt to get allegations or evidence of the intervening occurrences and developments into the record either by tendering a second amended complaint alleging them or by seeking pertinent information by discovery procedures. Counsel for both parties indicated satisfaction with this procedure since it offered whichever party might have been ultimately aggrieved by the ruling of the Court on the tendered amendment or objections to discovery an opportunity to record an exception to that ruling.

When at the end of a six months' period no attempt had been made to pursue either alternative, and it appearing probable that after further study plaintiffs' counsel had concluded that evidence of events subsequent to the accrual of the cause of action alleged would not be admissible, we advised counsel by letter that we "assumed that plaintiffs have abandoned their * * * indicated intention to supplement, or to attempt to supplement, the record." Paren-

thetically, we offer the view that if there have indeed been intervening occurrences and developments constituting invasions of constitutional rights, they could appropriately form the basis of separate litigation, even though they may not properly be appended to the present action. Our letter further advised counsel "that any suggested findings of fact received from any of counsel" would be taken into account and considered in the preparation of the further findings and conclusions required by the mandate of the Court of Appeals.

Responsive to that invitation, and under agreement entered into by them, counsel for both parties simultaneously filed suggested findings of fact. Those documents have been meticulously prepared and have been of great assistance in the findings which hereinafter appear. However, our findings are much more restricted in scope because of the limited nature of the Court of Appeals' mandate. Our original opinion herein was by its terms "filed as the Court's findings and conclusions in compliance with Rule 52 (a), Federal Rules of Civil Procedure," and it is not only not deemed necessary to reiterate the material set forth in that opinion, but it also would appear that such repetition would constitute only a burdensome excess. Accordingly, and in conformity with what we understand to be the direction of the Court of Appeals, this Court's findings of fact are those set forth in the original opinion and herein, read together.

Plaintiffs urge that a group of Supreme Court cases have substantially modified the law since the date of the Court of Appeals' decision herein. The cases cited in this context are Green v. County School Board of New Kent County, Virginia, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716, Raney [sic] v. Board of Education, Gould School District, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 and Monroe v. Board of Commissioners of City of

Jackson, Tennessee, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed. 2d 733, all of which were decided May 27, 1968. However, none of these cases is applicable because each involved a review by the Supreme Court of desegregation plans in school districts that had formerly operated under de jure segregation. So-called "freedom of choice" plans had been adopted in each instance, and it was held that they did not comply with the desegregation requirement of Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In his opinion in the present case, Chief Judge Weick observed, "At the outset it should be pointed out that the State of Ohio abolished segregation in the public schools on February 22, 1887, which was more than 67 years before the Supreme Court barred it on constitutional grounds in the momentous decision of Brown v. Board of Education, 347 U.S. 483, 74 Sup.Ct. 686, 98 Law Ed. 873 (1954)." The record herein clearly supports our earlier determination that while segregation in the Cincinnati public educational system was practiced between 1849 and 1887, since that date Negroes have attended neighborhood schools on the same basis as white children living in the same locality. The group of cases cited above dealt with situations in which the imbalance between white and Negro children was caused by an act of discrimination on the part of the school authorities, and accordingly present an entirely different situation than that here under consideration.

Speaking for the Court of Appeals in the present case, Chief Judge Weick anticipated the line to be drawn between such cases as the group cited by plaintiffs in which a new plan was being put in effect and those like the one before us where a neighborhood school plan had long been followed in this language (369 F.2d 63): "Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used

before, is different from that where the system has been used for many years and the imbalance in the schools is the result of population mobility among the various neighborhoods. In Dowell [Dowell v. School Board of Oklahoma Public Schools, 244 F.Supp. 971 (W.D.Okl.1965)] the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city."

Plaintiffs complain that at the trial of the present action evidence of racial discrimination in the public and private housing market was improperly excluded. The Court of Appeals made the following observation in this regard (369 F.2d 60, Note 4):

> "The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board [of Education] has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code § 4112.01-07."

Plaintiffs now present the interesting argument that this determination of the Sixth Circuit Court of Appeals, "should no longer be controlling" on this Sixth Circuit District Court, but that we should instead follow an opin-

ion of the Fourth Circuit (Brewer v. School Board of City of Norfolk, Virginia, 397 F.2d 37 (4th Cir. 1967)).

As is indicated in the quotation from its judgment set forth at the opening of this Memorandum, the Court of Appeals agreed that racial imbalance in the Cincinnati schools had not been shown by plaintiffs to have been intentionally caused by the Board of Education and affirmed our conclusion on that issue. In connection with what the Court of Appeals determined to be a deficiency in our original opinion the reviewing court pointed out that while plaintiffs offered expert evidence on the subject of the harm resulting to a Negro from the impairment of his capacity to learn because of his school's racial imbalance, but that since its motion to dismiss at the close of plaintiffs' evidence was granted, the School Board offered no opposing expert testimony. The Court of Appeals went on to observe, "No findings were made on these disputed issues. Without findings we are unable to determine whether discrimination existed with respect to specific schools and programs." The opinion then states the purpose of the remand in the language incorporated in the judgment above quoted.

Both in their original brief and in their proposed findings plaintiffs marshal many facts and figures from the record pertaining to the various schools in the Cincinnati system. They indicate the percentage of white and Negro students and teachers in different schools, the percentage of substitute teachers in the predominately white and Negro schools respectively, the comparative use of temporary classrooms in such schools, their comparative staffing by teachers with and without regular contracts and with and without masters degrees, and claimed differences in facilities in the different schools. An attempt is then made to correlate these and similar factors with pupil achievement and to thereby establish cause and effect.

To establish this relationship plaintiffs relied primarily on two expert witnesses. One of them had never even been in a school in the Cincinnati system; needless to say he had never taught in or been associated with the Cincinnati schools, and he had never lived in the city. The second expert witness possessed no greater familiarity with the Cincinnati situation. Both testified of obvious necessity in broad, general terms. In at least one important area, the second witness admitted that he was "puzzled" because an established factual situation in a Cincinnati school was inconsistent with his conclusion. Even in the case of the physical sciences, acceptance of a witness's qualifications for the purpose of permitting him to express an opinion as an expert does not require the trier of the facts to accept an opinion so expressed, and in an area as nebulous as we have here entered there is at best no greater compulsion to accept an expert's opinion. We decline to do so, and as is indicated by the sustaining of defendants' motion for judgment at the close of plaintiffs' case, such evidence was not considered of sufficient weight to require rebuttal.

In partial response to the inquiry of the remand, it is found and determined that neither gerrymandering nor any other alleged discriminatory practice on the part of the Board brought about such racial imbalance as existed, and that plaintiffs' expert testimony is found not to have been of such relevance, weight and probative value as to make an issue calling for rebuttal proof by defendants. Further response to the inquiry of the mandate is submitted in the Findings which follow:

## SUBSIDIARY FINDINGS OF FACT

1. From 1849 to 1887, separate educational facilities for Negro and white children were required by law. Thereafter the Cincinnati Board of Education (hereinafter

the "Board") established nondistricted schools for Negro children attended by them on a voluntary basis. No such schools have existed in the Cincinnati system since 1955 when the last such school was districted. Except for such voluntary attendance in such districted schools, since 1887 Negroes have attended neighborhood schools on the same basis as white children.

2. The Cincinnati schools operate under a neighborhood school plan which divides them into elementary, junior high and senior high schools. The senior high school attendance zone is made up of the attendance zones of the nearby junior high schools, which in turn derive their student population from the nearby elementary schools. The topographical characteristics of Cincinnati combined with its manmade barriers in the form of railroads, public thoroughfares and more recently expressways compel the following of irregular lines and patterns in composing the various districts, and the determination of those lines is made by the Superintendent. A further factor in his determination is the avoidance where possible of predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance.

3. Virtually every possible proportionate combination of white and Negro children exists in some school in the Cincinnati system. Carson School is 100% white while Dyer is all Negro. Hartwell School is 4.55% Negro, Hyde Park School has 14.61% Negro pupils, Clifton School is 20.99% Negro, Guilford School has Negro attendance to the extent of 39.06%, and so forth. The proportions are not constant. During a relatively short period of time in which there were no substantial changes in school attendance zone lines twelve Cincinnati schools changed to a heavy concentration of Negro pupils.

4. The only exceptions to the neighborhood school

plan are found in connection with Walnut Hills Junior and Senior High Schools, which provide a special college preparatory program open to students recommended by their elementary principals, Central High School, which provides special technical training, and special programs arranged to meet the needs of physically handicapped, deaf and blind students, and slow learning students. In 1964-65, 17.05 percentage of the Walnut Hills Senior High School was Negro, and of Walnut Hills Junior, 28.36%. During that year the percentage of Negroes in Central was 35.62.

5. There is not substantial evidence in the record to support plaintiffs' claim that attendance school boundary lines have been gerrymandered to exclude Negroes from certain schools. There is a high correlation of the distribution of Negroes throughout the school system to the general neighborhood residential patterns. Many areas which were formerly predominantly white then had schools attended predominantly by white pupils, now are predominantly Negro and the schools therein are similarly now predominately Negro.

6. The area served by Lincoln Elementary School was assigned to Withrow Junior High School rather than to Eastern Hills Junior High School on the basis of geographical and fiscal considerations, and there is no evidence to support the contention that the determination was a gerrymandering to exclude Negroes.

7. The controversial change in the attendance zone boundary line between the Evanston Elementary School and the Hyde Park Elementary School in 1956-57 temporarily increased the number of Negroes in the predominantly white Hyde Park School, but was without lasting effect on the racial composition of the Evanston School. The change was made to correct a condition of overcrowd-

ing at Evanston and to take advantage of available vacant space at Hyde Park.

8. The opening of Ach Junior High School in September, 1950, precipitated changes in attendance areas of Withrow Junior and Woodward Junior High Schools. These resulted from routine administrative decisions rather than any racial consideration. The evidence establishes that pupil assignments were based on school building capacities and the requirements of increasing numbers of children.

9. Schools throughout the Cincinnati Public School System are overcrowded. The Division of Research, Statistics and Information of the Cincinnati Public Schools aided by the Bureau of Educational Research and Service of the Ohio State University prepared a report, "Survey of School Plant Needs, Cincinnati Public Schools." When this case came to trial school construction recommended in this report was either recently completed, under construction, or soon to be commenced. The evidence shows no relationship between the racial composition of a neighborhood involved and the decision of whether or not a new school building would be built there.

10. The survey of school plant needs called for four junior high schools (in Madisonville, Mt. Washington, Mt. Lookout and Walnut Hills-Evanston) in the Withrow High School district. While junior high schools were in construction or contemplation in these areas a large population shift occurred involving a large influx (predominately Negro) into Walnut Hills and Evanston. This gave rise to contentions that attendance zone boundary lines were determined on a basis of race, but the evidence establishes that such was not the case and that the determination of the lines constituted a reasonable exercise of discretion by the Superintendent.

11. Aiken High School was opened in September, 1962 in an area known as College Hill. The topographical

characteristics of that area are even more extreme than in other Cincinnati areas and the establishment of zone attendance boundary lines is accordingly even more difficult, and further complications were created by an unanticipated enlargement of the student population. The decisions made by the Superintendent with regard both to Aiken and to schools having correlated problems were on the basis of his professional judgment as to the most appropriate way to provide school accommodations, and were not made on the basis of race. No significant change in the racial composition of the schools resulted from these administrative decisions.

12. Madisonville is a Cincinnati neighborhood composed of both Negro and white residents. In September, 1964, Bramble Elementary School was opened to serve the southeastern portion of the Madisonville attendance zone. Then and immediately thereafter boundary line changes were made and consideration of the Madisonville-Bramble school attendance zone lines prompted the adoption by the Board of the statement of policy of March 9, 1964, set forth in full in our original opinion (244 F.Supp. 581). The determination of these zone boundary lines constituted a reasonable exercise of the Superintendent's administrative discretion and was not based on an attempt to gerrymander lines in order to artificially separate races. On the contrary, the determination was intended to result in maximum interracial experiencess among the children.

13. At the beginning of the 1963-64 school year a transfer of pupils was necessary in order to relieve overcrowding of the Evanston School building, predominately populated by Negro students. In acordance with established policy, these temporary transfers, which were accomplished by the use of buses, were of classes which then occupied rooms in the Oakley School, predominately otherwise occupied by white students. As is indicated by the charts prepared in

connection with these various transfers which were received in evidence, difficult and complicated administrative problems were presented. Transportation of pupils a substantial distance from their homes in a predominately Negro neighborhood to a predominantly white neighborhood was necessary. The determination both of the need for the transfer and the means of accomplishing it was a reasonable exercise of discretion by the Superintendent. It was not undertaken for the purpose of separating races, and in fact placed them in greater proximity with one another.

14. An emergency situation developed in the Millvale area during the 1956-57 school year which persisted through the next two years. This resulted in large part because of the opening of a new Metropolitan Housing Authority housing project the occupancy of which resulted in an overtaxing of the Garfield and Washington Elementary Schools that normally served the neighborhood. The Authority had announced that this would be an integrated housing project but only Negro families moved in. Rather than move small groups of students from school to school each year as various classrooms became available the Superintendent decided to transport all of the pupils as a group to the Douglas School, it being the only one which could accommodate such pupils throughout the entire period of emergency. The course chosen was more economical, was more efficient administratively and avoided the probability of having children of the same family in different schools at the same time. The charts and graphs received in evidence showing the number of students involved, the schools in which space was available and the geographical relationship of the various schools demonstrate the complexity of the problem. The solution adopted by the Superintendent constituted a reasonable exercise of his discretion, pursuant to his power and duties under the law of Ohio. This exercise of discretion did not con-

stitute an unlawful abuse thereof and was not undertaken for the purpose of artificial separation of races.

15. Defendants have consistently withstood efforts to assign children to schools on the basis of race, and successfully defended (on the basis of the neighborhood school policy) litigation instituted by white parents who did not want their children to attend schools with Negro children. Applications for transfer from one school to another to avoid attendance with schools [sic] of another race have been denied.

16. There is no inequality of educational facilities based upon racial classification of students in the Cincinnati Public Schools.

17. Evidence containing detailed test data for all of the Cincinnati schools arranged in accordance with the percentage of Negroes in each school does not establish any relationship between racial composition of the school and pupil achievement. For example, five schools had exactly the same median grade equivalent on the Stanford Immediate Achievement Test and had the following percentage of Negro pupils: 0, 8, 15, 99 and 100.

18. Plaintiffs' two expert witnesses (professors from Antioch College, Yellow Springs, Ohio, and Washington University, St. Louis, Missouri, respectively) agreed that any deleterious effects that may have been attributed to a racially imbalanced school could, with equal probability, have been caused by preschool age family influences, neighborhood social environment, the family's economic status, and other socio-economic forces concededly beyond the control of defendants. Neither witness could explain why one 100% Caucasian school was being over-achieved by each predominantly Negro school in the Cincinnati system in a way that was consistent with their primary assertions. Plaintiffs' expert testimony is not of such relevance, weight

or probative value as to make an issue calling for rebuttal by the defendants.

/s/ John W. Peck
District Judge Sitting by Designation

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**Tina DEAL et al., Plaintiffs-Appellants,**

**v.**

**The CINCINNATI BOARD OF EDUCATION et al., Defendants-Appellees.**

**No. 16863.**

United States Court of Appeals
Sixth Circuit.
Dec. 6, 1966.

**369 F.2d 55**

Before WEICK, Chief Judge, and O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge.

The suit in the District Court was a class action against the Board of Education of the City of Cincinnati, brought by the parents and next friends of Negro pupils enrolled in the public schools of the city, to enjoin the operation of allegedly racially segregated public schools, to enjoin the construction of new schools on sites which would increase and harden alleged existing patterns of racial segregation, and for declaratory and other relief.

The Board denied that it created, operated or maintained racially segregated schools, and alleged that the only genuine issue in the case was whether it violated the con-

stitutional rights of the plaintiffs by refusing to adopt and enforce an affirmative policy of balancing the races in the Cincinnati Public School System.[1]

The evidence in the case consisted of a number of lengthy stipulations, exhibits, and oral testimony. At the close of plaintiff's evidence defendants moved for judgment, which motion was taken under advisement by the Court. Defendants presented their entire case except for expert testimony. The Court then granted defendants' motion for judgment without considering the evidence offered by the defendants. He handed down an opinion which he adopted as findings of fact and conclusions of law under Rules 41 (b) and 52 (a), Fed.R.Civ.Proc.[2] In essence, the Court held that there was no constitutional duty incumbent upon the Board to balance the races in the public school system, and that there was a failure of proof on the part of the plaintiffs to establish a policy of segregation or gerrymandering on the part of the Board.

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[1] On March 9, 1964, after the commencement of the present action, the Board of Education adopted the following policy statement to guide its officers and employees:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R. C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Section 3313.48, and the numerous factors which have always been considered in establishing such zone lines—safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

[2] Deal v. Cincinnati Board of Education, 244 F.Supp. 572 (S.D. Ohio 1965).

**Was There A Constitutional Duty On The Part Of The Board To Balance The Races In The Cincinnati Public Schools Where The Imbalance Was Not Caused By Any Act Of Discrimination On Its Part?**

At the outset it should be pointed out that the State of Ohio abolished segregation in public schools on February 22, 1887, which was more than 67 years before the United States Supreme Court barred it on constitutional grounds in the momentous decision of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).[3]

[1] The so-called neighborhood plan for the location of public schools is authorized by statute under which Ohio School Boards are required to—

> "* * * provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be convenient for the attendance of the largest number thereof." Ohio Rev. Code § 3313.48.

We think the legislature had the power to enact this statute. The Cincinnati Board of Education has complied with it.

Appellants contend that the maintenance of a public school system in which racial imbalance exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student

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[3] 84 Ohio Laws 34, enacted Feb. 22, 1887. The Supreme Court of Ohio upheld and enforced the law in the following year, Board of Education v. State, 45 Ohio St. 555, 16 N.E. 373 (1888). The Cincinnati school system discontinued compulsory segregation promptly after the enactment of this Ohio Statute in 1887. Since that time Negro students have had the opportunity to attend the neighborhood schools in Cincinnati on the same basis as white students living in the same localities.

population is not spread uniformly throughout the Cincinnati school system, without a showing of deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance. Appellants claim that it is harmful to Negro children to attend a racially imbalanced school and this fact alone deprives them of equal educational opportunity.

The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race. While the detrimental impact of compulsory segregation on the children of the minority race was referred to by the Court, it was not indispensable to the decision. Rather, the Court held that segregation of the races was an arbitrary exercise of governmental power inconsistent with the requirements of the Constitution.

[2] A finding of educational or other harm is not essential to strike down enforced segregation. This is shown by many subsequent cases nullifying separate facilities of all kinds with no evidence of harm.

In summarizing this principle, the Court said that classifications based on race violate the Fourteenth Amendment because they are obviously invidious and irrelevant. Goss v. Board of Education, 373 U.S. 683, 687, 83 S.Ct. 1405, 10 L.Ed. 2d 632 (1963).

Thus it is not necessary that a victim of racial discrimination prove that he was harmed in any specific material sense in order to invalidate state-imposed racial distinctions. See Johnson v. State of Virginia, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (1963) (seating in courtrooms); Watson v. City of Memphis, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963) (municipal parks); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (restaurants in public

buildings); Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386 (4th Cir. 1955) aff'd 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) (public beaches and bathhouses).

In Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), which is a companion case to *Brown*, and which involved the validity of school segregation in the District of Columbia, the Court held that the Fifth Amendment was violated. The Court emphasized that it was the fact of discriminatory classification by the government that violated the Constitution, and looked no further for evidence of educational or psychological injury, saying—

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." Bolling v. Sharpe, supra, at 499, 74 S.Ct. at 694.

[3, 4] The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options had been constricted without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

[5] Conversely, a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the

existing choices, the school board is certainly not responsible therefor.

Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

[6] The standard to be applied is "equal educational opportunity". The Court in *Brown* cast its decision thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time.

Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in re-

ducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. Brown v. Board of Education, 347 U.S. 483, 495 note 13, question 4 (a), 74 S.Ct. 686, 98 L.Ed. 873; Brown v. Board of Education, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). But see Blocker v. Board of Education of Manhasset, 226 F.Supp. 208, 221-222 (E.D.N.Y. 1964).

Because of factors in the private housing market, disparities in job opportunities, and other outside influences, (as well as positive free choice by some Negroes) the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown*. We do not accept this contention. The element of inequality in *Brown* was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society.

**[7, 8]** In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of

a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school prejudice.[4] We read *Brown* as prohibiting only enforced segregation.

[9, 10] The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered uniformly to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system. Thus, whereas such a geographical principle might be totally unacceptable in the admini-

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[4] The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code § 4112.01-.07,

stration of facilities such as beaches, parks, restaurants, or golf courses (see desegregation cases cited above), the school system presents problems of an altogether different nature and the fair minded judgment of the school officials is entitled to full consideration in determining whether freedom of choice has been preserved for the children within the limits necessary for effective educational practice. See Watson v. City of Memphis, supra, 373 U.S. at 531—532, 83 S.Ct. 1314.

[11] We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.

The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of adequate transportation and proper facilities and personnel for the supervision, education and well being of *all* pupils. All of this must be accomplished within the Board's budget.

Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, it has been held that it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm. Balaban v. Rubin, 14 N.Y.2d 193, 250 N.Y.S.2d 281, 199 N.E.2d 375 (1964), cert. denied 379 U.S. 881, 85 S.Ct. 148, 13 L.Ed.2d 87 (1964); Morean v. Board of Education of Montclair, 42 N.J. 237, 200 A.2d 97 (1964).

"The tenor of these and related decisions * * *

> clearly indicates that the Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system." Offermann v. Nitkowski, 248 F.Supp. 129, 131 (W. D.N.Y. 1965).

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved. See Freund, Civil Rights and the Limits of the Law, 14 Buffalo L.Rev. 199, 205 (1964).

Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed2d 991 (1958); Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); Ex parte State of Virginia, 100 U.S. 339, 25 L.Ed. 676 (1879); Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).

However, it is equally clear that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which is to try him nor on the venire or jury roll from which petit jurors are to be chosen. Swain v. State of Alabama, 380 U.S. 202, 208, 85 S.Ct. 824, 13 L.Ed2d 759 (1965); Akins v. State of Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed 1692 (1945). While the two situations may not be completely analogous, the potential dangers to a criminal defendant forced to face a racially imbalanced jury, are at least as great as the intangible, often speculative injuries threatening a student in a racially imbalanced school. The cases recognize that the calculus of equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables which may be manipulated differently to achieve the same result in different contexts.

[12, 13] If the separation in imbalanced schools is the result of racial discrimination, the officials must take steps to remedy the situation. However, the Constitution does not prescribe any single particular cure, and the mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.

Two other Circuits have considered this question and have come to the same conclusion. Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965); Bell v. School, City of Gary, 324 F.2d 209 (7th Cir. 1963), cert. denied 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964). See also Springfield School Comm. v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965).

Appellants rely on several decisions which they contend establish the constitutional invalidity of imbalanced schools. However, it would seem that these cases do not go that far. In each of them there was an added element

which transmuted mere separation into segregation, difference into discrimination. This is in accord wth our holding that bare statistical imbalance alone is not forbidden. There must also be present a quantum of official discrimination in order to invoke the protection of the Fourteenth Amendment.

In Taylor v. Board of Education of City School Dist. of New Rochelle, 294 F.2d 36 (2nd Cir. 1961), cert denied 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339 (1961), the Court of Appeals characterized as "crucial" the District Court's finding that the defendant School Board has deliberately created and maintained a segregated school, saying at page 39:

> "In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school."

This situation, where affirmative gerrymandering of school districts had been accomplished and maintained with the motive of separating the races, was found to go "beyond *mere* imbalance" (emphasis added). This latter language clearly indicates that the Court's theory was one of "imbalance plus." See also Kaplan, Segregation, Litigation and the Schools: The New Rochelle Experience, 58 Nw. U.L.Rev. 1 (1963).

Appellants place much emphasis on Dowell v. School Board of Oklahoma City Public Schools, 244 F.Supp. 971 (W.D.Okl. 1965), but we are unable to adapt that case to the problem of racial imbalance. Despite appellants' assertion that the District Court in *Dowell* dealt with facts similar to those in the case before us, it is clear that it did not. In that case the problem was one of initial desegregation of a school system which had previously been organized along the dual racial lines condemned by *Brown*. The Court was explicit in this respect:

"This case does not raise issues regarding a school board's constitutional duty to correct racial imbalance in localities where there is no prior history of segregation, or where prior racial policies are deemed corrected." (pp. 980–981)

Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used before, is different from that where the system has been used for many years and the imbalance in the schools is the result of population mobility among the various neighborhoods. In *Dowell*, the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city. Thus, the problem in *Dowell* was far closer to the gerrymandering in *Taylor* than to anything in the classic statistical imbalance cases in northern cities.

Finally, in the one case in which a District Court apparently accepted the appellants' theory of racial imbalance, Barksdale v. Springfield School Comm., 237 F.Supp. 543 (D.Mass. 1965), the First Circuit, in vacating the decision and dismissing the complaint without prejudice specifically rejected any such asserted constitutional right. Springfield School Comm. v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965).

Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action

to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief.

**Did The Board of Education Intentionally Cause Racial Imbalance In The Cincinnati Public Schools, Deprive Negro Children Of Equal Educational Opportunities, And Discriminate Against Negroes In The Hiring And Assignment Of Teachers?**

In their "Statement of Questions Involved" appellants assert that they have sufficiently shown that the Board of Education has *intentionally* caused, and then failed to eliminate, serious racial imbalance in the Cincinnati public schools, has afforded Negro children who are confined to segregated schools, inferior educational programs and facilities, and has provided school facilities and personnel which reflect the racial patterns of students. They state that children who attend racially imbalanced schools suffer injury constituting a denial of equal educational opportunity.

[14, 15] The findings of fact of the District Court assume significance in our review of this phase of the case. Under Rule 52 (a) the court was required to find the facts specially. The findings should be both "comprehensive and pertinent to the issues to provide a basis for decision." Schilling v. Schwitzer-Cummins Co., 79 U.S. App.D.C. 20, 142 F.2d 82, 84 (1944); Shapiro v. Rubens, 166 F.2d 659 (7th Cir. 1948). In meeting this standard, the District Courts are not required to prepare elaborate findings on every possible issue or contention raised at

trial. However, there must be subsidiary findings to support the ultimate conclusions of the court. Kelley v. Everglades Drainage District, 319 U.S. 415, 420, 63 S.Ct. 1141, 87 L.Ed. 1485 (1943); Dearborn Nat'l. Cas. Co. v. Consumers Petroleum Co., 164 F.2d 332, 333 (7th Cir. 1947). See also Townsend v. Benavente, 339 F.2d 421 (9th Cir. 1964). But see Gay Games, Inc. v. Smith, 132 F.2d 930, 931 (7th Cir. 1943).

At the trial level this case confronted the District Court with an enormous amount of evidence in the form of detailed maps, charts, statistical tables, sociological studies, and historical accounts, in addition to a substantial amount of oral testimony, expert and otherwise. To his credit, the District Judge succeeded to a great degree in expediting the trial through the extensive use of many stipulations and effective pre-trial procedures, which sharpened the issues. However, in his opinion he adopted as fair the following statement taken verbatim from the School Board's brief:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

Then, after discussing the issue of imbalance, he stated:

> "Their [appellants'] failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof * * *."

[16] In dealing with the issue of discrimination in the context of a great metropolitan educational complex, these general findings do not present an adequate basis for review by this Court.

The District Court's finding on the racial composition of the schools in Cincinnati reveals that the schools are indeed racially imbalanced. In other words, the Negro student population is not spread uniformly among the individual schools, mainly because of the operation of the neighborhood school policy in conjunction with the residential concentration of Negroes in some areas. As the District Court held, and we affirmed above, this fact by itself gives rise to no relief. However, the crucial fact to be found is whether the racial imbalance was intentionally caused by gerrymandering or by other alleged discriminatory practices on the part of the Board. On that point the District Judge said only that appellants had failed to produce evidence to establish gerrymandering or other discriminatory practice and that this failure strongly suggested that such practices did not exist. Such a general finding must be supported by subsidiary findings of fact. Kelley v. Everglades Drainage District, supra.

Appellants, through extensive use of discovery techniques, adduced vast quantities of information concerning matters such as alleged discrimination in school attendance zoning, transportation policies, teacher selection and assignment, comparative test results, and policies on transfers and overcrowding of students. Some of their contentions with respect thereto are answered by appellees on appeal here, but some are not. This is due partly to the truncated status of the case at the time of the District Court's decision on the motion to dismiss, and partly because the Court considered only appellants' and not the School Board's evidence in ruling on the motion.

An example of such unanswered and unaccounted for

situations is the districting of the Sawyer Junior High School where the enrollment is mostly Negro. The fact is that its boundaries exclude children who live across the street from it in a largely white neighborhood. The School Board in its brief offered no explanation for this situation or for the selection of the Sawyer site so close to the existing Withrow Junior High School.

[17] We have stated above that a showing of impairment of a Negro student's capacity to learn, arising from his school's racial imbalance, does not, standing alone, make out a case of constitutional deprivation. Evidence of such harm, however, may indeed be relevant to the issues of the case before us. Appellants offered expert evidence on this subject. The School Board offered no opposing expert testimony, no doubt because the Court granted the Board's motion to dismiss, made at the close of plaintiff's proofs. Our review would be helped by a finding as to whether the District Judge considered plaintiffs' expert testimony of such relevance, weight or probative value as to make an issue calling for rebuttal proof by defendant.

No findings were made on these disputed issues. Without findings we are unable to determine whether discrimination existed with respect to specific schools and programs.

Other errors have been asserted which, in the light of our other holdings, we deem insubstantial.

The judgment of the District Court is affirmed on the issue of racial imbalance not intentionally caused by the Board, and the case is remanded for further findings on the issues of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer. Northcross v. Board of Education of City of Memphis, 333 F.2d 661, 663–664 (6th Cir. 1964).

**Tina DEAL, a minor, by Frank L. Deal, her father and next friend, et al., Plaintiffs,**

**v.**

**The CINCINNATI BOARD OF EDUCATION et al., Defendants.**

**Civ. A. No. 5483.**

United States District Court
S.D. Ohio, W.D.
July 26, 1965.

**244 F. Supp. 572**

JOHN W. PECK, District Judge.

This is a class action brought by Negro children through their parents and next friends complaining of alleged racial imbalance in Cincinnati public schools.

After repeated informal and pretrial conferences between the Court and counsel, numerous hearings on preliminary motions (including one for summary judgment), and unusually exhaustive discovery procedures, this cause came on for trial. Prior thereto plaintiffs had been unsure as to which experts they would call and what areas would be covered by their testimony and trial was entered into under an agreement providing that plaintiffs would present their entire case, defendants would present their entire case except for responsive expert testimony, whereupon trial would be continued to an agreed date at which later time defendants' experts' testimony and plaintiff's rebuttal would be received.

At the conclusion of plaintiff's case, defendants moved for judgment, and it is that motion which is presently under consideration. Upon its making, the motion was extensively argued orally, and has since been thoroughly

briefed by counsel. Subsequent to that oral argument, and in accordance with the previous agreement, defendants presented their "factual" case (i e., their entire case except for expert testimony), but nothing contained therein is before the Court for purposes of the present motion and will not hereinafter be taken into account.

The Amended Complaint lists as plaintiffs 96 (including 52 intervenors) "minor citizens of the State of Ohio," suing through their parents and next friends "on their own behalf and on behalf of thousands of [other] Negro minors within the school district of Cincinnati, who are similarly situated because of race and color." The Cincinnati Board of Education, its superintendent and the individual members of the Board are named defendants. For present purposes, the eleven paragraphs of the prayer of the Amended Complaint may be fairly summarized by setting forth one of them:

> "(3) That defendants be further enjoined from operating and providing racially segregated public schools, assigning plaintiffs, and the members of the class they represent, to racially segregated schools, and seeking to further extend existing patterns of racial segregation."

The Amended Answer to the Amended Complaint permitted to be filed over plaintiffs' objections at trial (Transcript of Proceedings [hereinafter designated by "T."] 5-6; T. 325) "generally" denies the essential allegations of the Amended Complaint, specifically denies that plaintiffs have suffered damage, injury or irreparable harm or that they have any real interest in this action, and avers that the "real party in interest is the National Association for the Advancement of Colored People, which is responsible for the commencement of this action and has maintained and controlled it on behalf of the plaintiffs since its commence-

ment;" denies any "good faith" effort to negotiate the issues on the part of plaintiffs, while averring such negotiation by defendants; and denies the jurisdictional right of this court to consider the issues presented in this action because of the failure of plaintiffs to exhaust their administrative remedies under Ohio law.

From the time of our earliest contact with this case an earnest effort has been made to elicit from counsel an agreed statement of the issue[s] and to cause the case to be placed in posture for submission by stipulation supplemented by expert testimony.[1] Some indication of the difficulties encountered in attempting to define the issues and eliminate superfluous testimony is indicated from the following statement contained in our Memorandum Opinion filed March 9th, 1965, disposing of defendants' Motion for Summary Judgment:

> "[T]he motion will be overruled on the narrow ground that defendants have failed to established that there is no genuine issue as to any material fact which can be satisfactorily isolated from the whole of the rambling, rhetorical Amended Complaint.

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[1] Receipt of such testimony was vigorously resisted by defendants, and while expert testimony has been received in other cases of this nature (See, e.g., Northcross v. Board of Education, 333 F.2d 661 (6th Cir. 1964), cert. denied, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810 (1964); Kelley v. Board of Education, 270 F.2d 209 (6th Cir. 1959), cert. denied, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959); Dowell v. School Board, 219 F.Supp. 427 (W.D.Okla. 1963); Blocker v. Board of Education, 226 F.Supp. 208 (E.D.N.Y. 1964); Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D.C. Mass.), rev'd 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, Indiana, 213 F.Supp. 819 (N.D.Ind.) aff'd, 324 F.2d 209 (7th Cir.), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1963), no reported case indicates such an objection or the ruling thereon. In the absence of controlling authority, the Court here took the position throughout that objection to such testimony went rather to the weight than to the admissibility of the testimony (e.g., T. 318, 322, 325 and 352), and overruled the objections.

"This is not to say, however, that we are in agreement with plaintiffs' further argument that this conglomeration of allegations constitutes a 'one-count' cause of action. We cannot agree with this because in spite of the many, many hours that have been spent in hearings, conferences with counsel and in reviewing the myriad pleadings, motions, answers to interrogatories, objections, exceptions, depositions and exhibits (with an aggregate bulk of many pounds) we have yet to be advised as to what that 'one-count' is. A comment from our Memorandum Opinion of August 4th, 1964, is as appropriate now as it was then:

> " 'As a matter of fact, even at this late date in this action which has consumed countless hours of the time of all concerned the issues continue to be clouded and obscure.'

"In view of the proximity of the pretrial conference, it seems pointless to here comment further on the difficulties which have been encountered in attempting to get this cause squarely at issue. Counsel have been asked time after time what single fact in this entire matter is not readily capable of stipulation, but no affirmative response has ever been made."

Monumental effort on the part of counsel did, in fact, result in great progress in the area of stipulation, and at the time of the pretrial conference April 9, 1965, it appeared probable that the entire factual presentation could be so presented. However, counsel for plaintiffs then advised that in addition to the stipulations and expert testimony, they proposed to call the individual defendants and various employees of the Board of Education as on cross-examination. We immediately advised that while no doubt existed as to their right (as distinguished from advisability of doing so) to call parties as on cross-examination, in the absence of clear authority employees other than managing agents could not be so called. At that

conference we ineffectively suggested that from plaintiffs' point of view stipulations could not reasonably be expected to be strengthened by cross-examinations of the Board's members and its superintendent, and that explanations weakening the stipulations might well be forthcoming. Parenthetically, we offer the comment that the latter did in fact occur.

The question of the right of plaintiffs to call Board employees not parties hereto as on cross-examination was raised squarely when plaintiffs called one John Shreve (then not otherwise identified). The record reflects the following (T. 217B-219):

"JOHN SHREVE

"called as a witness by Plaintiffs, being first duly sworn, was examined and testified as follows:

"MR. STEEL: Your Honor, I call Mr. Shreve as an adverse witness under Rule 43 (b).

"THE COURT: That will be denied.

"MR. STEEL: Excuse me, Your Honor.

"THE COURT: That request will be denied.

"MR. STEEL: Can I have the basis of that ruling, Your Honor?

"THE COURT: Yes, you may.

"The basis of the ruling is that 43 (b), of the Federal Rules of Civil Procedure, provides that: 'a party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation,' and so forth, as on cross-examination.

"It is the holding of this Court that this witness at this time does not fall within any of the permissive portions of that rule to permit his cross-examination by counsel for the Plaintiff.

"MR. STEEL: Your Honor, I note an objection to that ruling, and urge the arguments that I made in my pre-trial brief.

"THE COURT: For the further information of counsel I will make this additional explanation as I did to counsel at the time of the last pre-trial conference.

"I would in any event with reference to a private corporation not at this stage of the proceedings, permit the calling of this witness as on cross-examination, on the ground that he is not a managing agent.

"However, I further point out, as I did to counsel on the record in the pre-trial conference that we are here dealing not with persons who are employed in a private capacity, but we are dealing with public servants. I take no offense at being called idealistic, if you care to do that, but I have enough idealism to be absolutely convinced, until the contrary is shown, that public servants are just exactly what is connoted by that term. They are serving the public, not an individual master. When as and if this witness, or any other witness called by any party demonstrates hostility, I need hardly say to you that a motion for the right to cross-examine may be made. And until that time occurs, as indicated, the request will be denied."

Shreve's subsequent testimony established him as an assistant superintendent in the Cincinnati school system in the department of special services. However, plaintiffs had themselves already elicited from Wendell Pierce, Superintendent of Schools, the fact that the responsibility for decisions within the school system was his alone and that such responsibility was neither delegated to nor shared by assistant superintendents (T. 130-131). In fact, under Ohio law a superintendent must so assume full responsibility (O.R.C. § 3319.01), and can neither so delegate nor share. The authorities cited by plaintiffs in contending

for their right to cross-examine such witnesses are not in point.[2] Plaintiffs then further preserved their record on this point by offering to call three other specified assistant superintendents as "adverse witnesses under Rule 43 (b)" and taking exceptions to the denial of such right. (T. 260-263).

One further comment in this general regard seems proper. After the Court's refusal to permit plaintiffs to cross-examine Mr. Shreve, they proceeded through a rather extensive direct examination of him, followed by a thorough cross-examination by defendants. Since plaintiffs had thus made Mr. Shreve their witness, we would be justified in considering them to be bound by his testimony, and adoption of such a position would be fully fatal to plaintiffs' cause. Such position is not here adopted.

One other evidentiary area was denied plaintiffs, and once again the record reflects a ruling consistent with the position indicated by the Court during early conferences. Plaintiffs called one Dean Clark, a relocation representative

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[2] T. 259—260: "THE COURT: The record will indicate [your objection]:

"I will make this comment, as briefly as I can, Mr. Steel.

"First, none of the authorities which have been cited are in any way controlling on this Court, the cases to which reference has been made dealing with public authorities.

"Second, the case and line of cases on which you have principally relied, which I understand to be exemplified by Newark Insurance Company vs. Saratain, 20 F.R.D. 583, are in no way applicable to the present situation, and are thoroughly distinguishable on the facts.

"Finally, and most basically, this is the ground on which we rely primarily, it has not been shown as was stated in the course of the Court's ruling yesterday that this witness is a managing agent under the contemplation of Rule 43(b).

"You have made reference to Dr. Pierce's testimony. I call to counsel's attention that you elicited from that witness the fact that the responsibility as a matter of both fact and law remained with him.

"In view of that fact, it cannot be said that this witness is clothed with the authority of a managing agent as that phrase is used in the rules."

for Urban Redevelopment in the employment of the City of Cincinnati (The City is not, of course, a party to this action.). In fifteen pages of testimony (T. 263 et seq.) Mrs. Clark outlined her duties in assisting persons dispossed under Urban Redevelopment programs in obtaining new housing. She then identified (T. 278) a proffered exhibit as "a listing from an investment corporation of both White and non-White vacancies in the city." Following objection to the exhibit, the following colloquy appears; it is quoted at length because both plaintiffs' and the Court's positions are reflected (T. 279-287):

"THE COURT: How does it become material, Mr. Muldrow?

"MR. MULDROW: It becomes material, sir, from the viewpoint of Negroes being segregated in public housing by public officials.

* * *

"THE COURT: The only public officials named in this suit are members of the Cincinnati Board of Education, and the Board. Even conceding that there may have been improper action taken by the City of Cincinnati, or the governor of Arizona, or some other public authority, how do we here become concerned with that?

"MR. MULDROW: We become concerned, Your Honor, because the Board of Education is a public body, and the City of Cincinnati is a public body, being a part of the State of Ohio. And here we have state action which is practicing segregation upon Negroes, and in that respect it is pertinent to the question of whether or not Negroes are segregated in the Cincinnati Public School System, and whether or not they are receiving equal educational opportunities.

"THE COURT: Mr. Muldrow, how could any order that might issue from this Court be binding on any person, private or public, who is not a party

to this action and has not had an opportunity to respond, in either a public or private capacity?

"MR. MULDROW: Our position, Your Honor, on that particular question is that we have before this Court an agency of the state, the Cincinnati Board of Education, which is segregating against Negro children; and further that Negro children are segregated in housing, and that one part of the state cannot segregate, which will affect another part.

"THE COURT: Mr. Muldrow, I don't want to debate with you what some other agency may or may not do. I am only asking how this Court is empowered to take any action with reference to any individual, private or public, who is not a party to this lawsuit?

"MR. MULDROW: The action would be taken against the Cincinnati Board of Education, because we are saying the fact that even though another agency might discriminate, as far as in housing, that this could not be used as a scapegoat for the Cincinnati Board of Education furnishing equal educational opportunity to Negro children.

"The Cincinnati Board has to adjust to segregated housing in order to make equal educational opportunities available to all of its citizens.

"Therefore, an order would be directed to the Cincinnati Board of Education to correct whatever segregation is practiced upon Negro children, even though it might be brought about by another agency. But the Board has to deal with education, and segregated housing affects education. And this is the question, that you cannot get an equal educational opportunity by being confined or restricted to a particular section, and that the Board has power, or can do something about it to correct that segregation.

* * *

"THE COURT: Mr. Carter, in the one or two sessions which you have helpfully participated in, the pretrial conferences, you contributed very substantially to the forwarding of this matter. The Court stated to you then that while it was all very well to discuss many of the problems that arose in surrounding areas, that unless some disposition could be made on an amicable basis, if this matter proceeded to trial in an action in which you are seeking the extraordinary relief of injunction, we would find ourselves in a situation where we would be bound by the rules of such a procedure.

"If you care to offer anything on the question I have asked Mr. Muldrow, I would be pleased to hear it.

"MR. CARTER: I would, if it please the Court.

"What is being attempted to elicit from this witness is the fact that in a city agency relocating families, that the—in the assistance in relocating families, that the agency uses as a part of its information for relocation, lists in which properties are restricted on the basis of race, in assisting persons in finding houses.

"Now, this we think—we think, Your Honor, that this is a part of—we are attempting to show to the Court in some measure the participation of a public agency, not the Board of Education, but another public agency, in the residential segregation which exists in the City of Cincinnati, and * * * on the basis of which the School Board indicates that this is reason, because of housing segregation, geographical segregation, is the reason for the maintenance of the schools which we say are segregated schools.

"Now, it is true, of course, that the Court will not—need not make an inference on the basis of that, that this is a responsibility of the Board of Education. But our view of it is that this is a part of the picture which we think the Court should see and should view and should understand in coming to its conclusion in regard to whether this is or is not a violation of the

Fourteenth Amendment; and for these reasons we are attempting to elicit from the witness the procedure in regard to relocation. I understand this witness doesn't go out * * * and find houses, but we are attempting to establish that as part of the process a restricted list is used and is made available to the persons who are relocated by the city, which we think adds to segregation.

"This is the purpose or the intent of this testimony.

"THE COURT: Mr. Carter, the difference between us, and the point that I was attempting to make a few moments ago, is that I fail to see how it becomes material and proper evidence in this case to indicate transgressions or wrongdoings that may have been perpetrated by some other individual or agency.

"For example, I think it might be even entirely arguable that the actions of the governor of Alabama may have had some influence on some people in this district. We recently had within the Southern District of Ohio a national meeting of the Ku-Klux Klan. I am sure that you would not suggest that any evidence with reference to that matter could be brought into this courtroom.

"I strongly suggest to you, gentlemen, that the difference is only one of degree. You are picking an agency of the City of Cincinnati, which is entirely separate legally and factually, from the individual Defendants, as well as the defendant entity of the Board in this case.

"I suggest that the fact that there is some geographical proximity does not mean there is any reason for permitting whatever this lady's agency may or may not have done improperly come into this case.

"MR. CARTER: Your Honor, * * * we are not attempting to put Mrs. Clark on trial as a defendant. What we are really attempting to do for the Court was to elicit from her some facts in regard to the relocations of persons, which we think would add to the

Court's understanding and knowledge of the problem. We think that the problem, that part of the problem—and I think that it is going to be demonstrated, or that the Defendants are going to say that the problem is not any direct action that they do, but the problem is * * * basically one of segregated housing.

"THE COURT: Mr. Carter, we are exactly back to where we started. I am referring to the statement that I made to you when you were first in Cincinnati a year or so ago, that if we are in an injunctive proceeding we must be bound by the rules controlling an injunctive proceeding in the United States District Court. That does not in my conception extend to embracing and hearing transgressions by agencies other than those named in the complaint.

"MR. CARTER: I understand that, Your Honor, but I understood that Your Honor had indicated that to me at the time, that by bringing in other people, that we were bound by the rules. Of course, we recognize that. However, it is my feeling in terms of the whole evidence of what produces, or what causes or what is the basis of what we call segregated schooling here, that this is part of the evidentiary facts which we think we should present to the Court. And particularly we think it is a part of the evidentiary fact, that a part of this is produced by an agency of the City of Cincinnati.

"We respectfully submit that this isn't the same case as the governor of Alabama. I think that the governor of Alabama's action, or the Ku-Klux Klan is more tenuous action. We think here we have a direct agency involved, which is a public agency in the same city as the School Board, which helps create this situation. And this is the reason we want this evidence in.

"THE COURT: Gentlemen, I permitted this to be gone into a little more fully at this time than might otherwise be justified, but I wanted the counsel to understand the Court's position. I think that I understand your position.

> "The objection to the Plaintiff's Exhibit Number 1 for identification at the present time will be sustained, subject to the right of the Plaintiffs to reoffer the exhibit when and if it is shown to have some connection with the Defendants in this case."

[1, 2] It is here held that in an action against a board of education charging segregation or failure to desegregate pupils in the school system such board is in no way responsible for action taken or omitted by other public or private agencies or entities and that evidence thereof is not admissible in such action. On that ground the denial of admissibility of the Clark exhibit is reaffirmed and similar reaffirmance is made of other rulings at trial concerning evidence proffered as to actions taken or omitted by non-parties hereto on the same basis.

[3, 4] The conferences referred to in the colloquy between Mr. Carter and the Court occurred before the case was even technically at issue, and at a time when settlement of the issues between the parties, aided as they have been throughout by capable and cooperative counsel on both sides of the table, appeared entirely possible. At that time areas of discussion were entered into in chambers (and, we were given to understand, even more extensively at conferences in which we did not participate), and this was the reason for our cautioning comment. We conceive any subject to be a proper one for discussion during negotiation that might lead toward settlement of any lawsuit, but that is far from saying that evidence thereof is necessarily admissible. As we have repeatedly attempted to point out, that is particularly true in a case (1) involving broad social concepts (2) in which the extraordinary remedy of injunctive relief is sought. In our considered judgment it is far too easy to be led down the primrose path of platitudes and generalities when discussing such social evils as are claimed to underlie the present cause, and to forget

that path must end at the courtroom door. Once that threshold is crossed, a forum has been entered in which a plaintiff must clearly prove his case if he is to be afforded the extraordinary relief he seeks in a court of equity. (Goldammer v. Fay, 326 F.2d 268, 270 (10th Cir. 1964); Allen v. Pyrene Mfg. Co., 111 F.Supp. 819 (D.N.J. 1953); 43 C.J.S. Injunctions § 192 (1955); 28 Am.Jur. Injunctions, section 25 (1959)).[3]

Turning, then, from the temptation to let sympathy substitute for testimony and perhaps to let inclination prevail over precedent, and having examined what plaintiffs have *not* been able to establish, let us examine what they have in fact established on the record.

At the opening of trial, an agreed and executed stipulation was received in evidence, as were 249 exhibits detailed in it. That Stipulation is a meticulously prepared document consisting of 71 pages, exclusive of 24 pages of carefully arranged Contents and lists of exhibits. Without this document, and the agreements as to exhibits, presentation of plaintiffs' case alone could well have extended over weeks (if not months) instead of days, and appreciation is expressed for the effort and cooperation of counsel in this achievement. While the parties agree that the 72 separate stipulations are factually accurate, defendants have

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[3] On a previous occasion we expressed that thought in this manner (Memorandum Opinion filed August 4, 1964):

"At the request of the attorneys for the parties to the action, on two occasions conferences have been held in chambers with all representatives present and general discussions have been held. Necessarily and appropriately these discussions have gone into subject matters concerning which we have no official power to act, but the doors of our offices will always remain open if all concerned are of the opinion that our participation may be of any assistance. However, when we move from the conference table to the court room we regress to the narrow limits established by the pleadings and it is for that reason that emphasis is placed on the urgent need for a clarification of those issues."

objected to 49 of them as irrelevant and immaterial, and plaintiffs to one on the same grounds. While these objections in many instances have substantial merit, at this stage of the proceedings it is felt that having all of this material in the record may be of present or future assistance and all of the objections are accordingly overruled.

The record before us establishes the existence of a Cincinnati school system organized on what is known as a 6-3-3 basis; i. e., the elementary schools consist generally of kindergarten and grades 1 through 6, junior high schools of grades 7, 8 and 9, and senior high schools of grades 10, 11 and 12. During the 1964-65 school year there were 72 elementary schools, 16 high schools, 6 comprehensive schools, 1 college preparatory high school, 1 vocational and technical high school, and 9 special schools. This organization is shown by Stipulation 3, which establishes the following student enrollment for the 1964-65 school year:

| | | |
|---|---|---|
| Total in elementary schools | | 55,906 |
| White pupils | 34,122 | |
| Negro pupils | 21,784 | |
| Junior high school total | | 17,163 |
| White pupils | 10,409 | |
| Negro pupils | 6,754 | |
| Senior high school (including college preparatory high school) | | 14,691 |
| White pupils | 10,311 | |
| Negro pupils | 4,380 | |
| | | 87,760 |

The stipulation, largely through its Joint Exhibits, further establishes in great detail the historical background culminating in this tabulation of school population. These

Exhibits not only show the general increase of the school population over the years, but establish the racial trends in that population as well. Included are figures showing the racial composition of schools which have been opened and closed and virtually all conceivable data in these areas are supplied. Other Joint Exhibits (many of which are, as hereinabove indicated, of doubtful materiality) contain masses of statistical data, maps of residential areas indicating racial compositions and records establishing facts concerning the employment and placing of Negro and white personnel. In their brief, defendants summarize this portion of the record in the following statement, which we adopt as fair:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

The Stipulation then goes on to establish, again largely through its Joint Exhibits, vast masses of factual material concerning record-keeping practices, curriculum programs and the results of extensive pupil testing operations. To some extent overlapping the areas just mentioned, other Joint Exhibits deal with aspects of many of the individual schools, and with such matters as transportation, the use of temporary buildings, attendance zone patterns, and changes, and generally allied matters. The second phase of plaintiffs' case consisted of the testimony of experts testifying almost exclusively on the basis of the information provided by the Stipulation. Defendants' summary of this phase, which again is adopted as fair, is as follows:

> "A professor of Education from Antioch College and a professor of Sociology from Washington University, St. Louis, both expressed the opinion that 'a racially unbalanced school seriously affects a child's ability to learn.' (T. 371)"

It is the contention of the defendants, and this is supported by the Stipulation, that in the 78 years since segregation was abolished in Ohio in 1887 (84 Ohio Laws 34; Board of Education v. State, 45 Ohio St. 555, 16 N.E. 373 (1888)), Negro students have attended the neighborhood schools on the same basis as white students. The defendant Board has always operated its schools under what is commonly referred to as the "neighborhood plan," which is provided for by Ohio Revised Code, Section 3313.48, which provides:

> "The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, *at such places as will be most convenient for the attendance of the largest number thereof.*" (Emphasis supplied.)

While maintaining that race had not been considered in the selection of sites or the designation of attendance zones theretofore, the Board adopted the following resolution as a statement of policy March 9th, 1964, (Stipulation 11):

> "11. *Defendants' Policy Statement:* On the 9th day of March, 1964 the defendants agreed on a policy as a guide to officers and employees of the Board in selection of sites for schools, establishment of attendance area boundary lines and assignment of pupils. This policy is as follows:
>
> > "(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the

causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Sec. 3313.48, and the numerous factors which have always been considered in establishing such zone lines as—safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

The basic issue in this case is perhaps more clearly stated in the concluding paragraph of this policy statement than anywhere else. The gauntlet is clearly therein thrown down, and we turn to a consideration of whether on the case presented by plaintiffs this Court has either the right or the duty to enjoin establishment of any program "to attempt to balance races" in the subject school system.[4]

[5] In a case involving similar issues, a colleague in this Circuit has recently recognized the well established principle that "* * * public officials are presumed to have properly discharged their duties." (Craggett v. Board of Educa-

[4] At one of the several points at which plaintiffs offer definitions of issues, the following appears (Brief, p. 56): "The issue is whether racial imbalance should be eliminated where it can be done in conformity with sound educational procedures."

tion of Cleveland, 234 F.Supp. 381, 386 (N.D. Ohio 1964, Kalbfleisch, J.)). In support of that proposition, Judge Kalbfleisch cited the following: United States v. Chemical Foundation, Inc., 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131 (1926); In re State Thread Co., 126 F.2d 296 (6th Cir. 1942); and Donaldson v. United States, 264 F.2d 804 (6th Cir. 1959). This proposition has also been in part at least the basis of determinations sustaining school boards in Bell v. School, City of Gary, Indiana, 213 F.Supp. 819 (N.D.Ind.), aff'd, 324 F.2d 209 (7th Cir.), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1963) (Plaintiffs' contend this case to have been "wrongly decided."); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 895, 13 L.Ed.2d 800 (1965); Lynch v. Kenston School Dist., 229 F.Supp. 740 (N.D.Ohio E.D.1964), (appeal to the 6th Circuit Court of Appeals dismissed by plaintiffs-appellants July 2nd, 1965); Northcross v. Board of Education, 333 F.2d 661 (6th Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810 (1964); and Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D.C.Mass.), rev'd, 348 F.2d 261, (1st Cir. 1965).

A careful study of these cases, even read in the light of plaintiffs' arguments and giving special attention to the portions of the opinions on which plaintiffs place emphasis, fails to indicate more than the fact that the courts are giving recognition of the growing awareness of all men of the need to end discrimination in educational as in all other areas. In the present case the moot evidence of the Stipulation and Joint Exhibits alone would have established the increasing tempo of this trend, but plaintiffs added strongly to this showing by their cross-examination of individual defendants. Without exception, in spite of plaintiffs' repeated reference to them as "adverse," these witnesses demonstrated full awareness of and sympathy toward the problems complained of, as well as a knowledge

of the intensification of their legal obligation to perform their moral duty in this regard. It would be obtuse in the extreme not to recognize that this action, which would scarce have been given serious attention a decade or two ago, is a product of its times. Indeed, plaintiffs themselves indicate such recognition when they refer to the "* * * changing constitutional interpretations of the Fifth and Fourteenth Amendments to the United States Constitution, as well as provisions of applicable state laws." (Plaintiffs' Brief, p. 4.) Beyond doubt, the courts will not stand idly by and await change by attrition if legal and constitutional rights are shown to have been denied, but in the absence of clear evidence of such denial it is not for the judicial system to be the initiating factor in sociological reform.

[6] Reference has hereinabove been made to the extent to which this case has been prepared, and notation is made of the fact that plaintiffs have had unrestricted access to all of defendants' files and records for some two and a half years. Their failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof and that they are therefore not entitled to the relief prayed for in the Amended Complaint. Rule 41 (b), Federal Rules of Civil Procedure.

Specific comment should be made concerning two other contentions of the plaintiffs and defendants respectively. First, the conclusion here reached applies as well to plaintiffs' rights under Title 42, United States Code, Section 1983, as to their rights under the Constitution. Second, we do not reach the defense of defendants concerning plaintiffs' alleged failure to exhaust administrative remedies.

The facts are found to be as hereinabove indicated, and

this opinion is filed as the Court's findings and conclusions in compliance with Rule 52(a), Federal Rules of Civil Procedure. An order in conformity herewith may be presented.

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**Rachel Lynn BELL, a minor, by Mrs. Odessa K. Bell, her mother, etc., et al., Plaintiffs-Appellants,**

**v.**

**SCHOOL CITY OF GARY, INDIANA, et al., Defendants-Appellees.**

**No. 14152.**

United States Court of Appeals
Seventh Circuit.

Oct. 31, 1963.

**324 F.2d 209**

Before DUFFY, SCHNACKENBERG and CASTLE, Circuit Judges.

DUFFY, Circuit Judge.

Approximately one hundred minor school children enrolled in the public schools of Gary, Indiana, brought this action for a declaratory judgment upon their own behalf and also upon behalf of all others similarly situated. The principal relief asked was that defendants be enjoined from operating and providing racially segregated public schools

in Gary, Indiana. One of the named defendants is The School City of Gary, Indiana.[1]

Subsequent to the trial below, District Judge Beamer wrote an excellent opinion which was incorporated in his Findings of Fact and Conclusions of Law. The opinion has been printed (D.C., 213 F.Supp. 819). In this opinion on appeal we have approved of, adopted and used a number of the District Court's concise statements of fact.

Gary is a rapidly growing industrial city in northwest Indiana. The District Judge pointed out that "'Geographically it is shaped much like the capital letter 'T'. Its north boundary line is the southern shore of Lake Michigan. The stem of the 'T' extends approximately * * * two miles wide. The cross-bar of the 'T' is approximately four miles wide and extends east and west a distance of approximately ten and one-half miles. * * *"

In 1950, the population of Gary was 133,911 which included 39,326 Negroes. In 1960, the population was 178,320 of which 69,340 were Negroes.

The student population in the public schools of Gary for the 1951-1952 school year was 22,770 of which 8,406 or approximately 37% were Negroes. In the 1961-1962 school year there were 43,090 students in the public school system, and 23,055 or approximately 53% were Negroes.

In 1951, the School City of Gary maintained and used twenty school buildings. In 1961, the number of school buildings had increased to forty. Additional schools were in the process of completion at the time of the trial of this case.

In the school year 1961-1962, 16,242 students attended

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[1] By the terms of § 28-1902, Burns Indiana Statutes, the City of Gary is declared to be a school corporation for school purposes "* * * and shall be known and designated as 'School City of [Gary] Indiana.'" Where the term "defendant" is used in this opinion, reference is to School City of Gary, Indiana.

twelve schools which were populated from 99 to 100% by Negroes; 6,981 students attended five schools which were 77 to 95% Negroes; 4,066 attended four schools which had a range from 13 to 37% Negroes; 5,465 attended five schools which had a Negro population of from one to five percent.

The Negro population in Gary is concentrated in the "Central District" which occupies roughly the south half of the cross-bar of the "T" from east to west and is bounded on the north by the Wabash Railroad and on the south by the city limits and the Little Calumet River. Approximately 70,000 Negroes including 23,000 Negro school children live in this District which comprises about one third of the area of the city.

The City of Gary was organized in 1906. Originally, eight school districts were laid out, and as the school population required, one large school was built in each of the eight districts. As the school population expanded, elementary schools were built. At the same time, attendance zones were drawn for such elementary schools and as the students completed the course in the elementary school to which they were assigned, they then went to the high school in the district in which they resided for the completion of their public school education.

The Board of School Trustees is a bi-partisan Board of five members appointed by the Mayor. The Board elects its own officers. Dr. LeRoy Bingham, a Negro, was the President of the Board when this suit was commenced. At the trial, he testified there was no policy of segregation of races in the Gary School system. He also testified the Board adopted a policy of transferring students from several congested areas to less congested areas in order to try to balance the loads in the various buildings; that it was the policy of the Board to make complete use of the facilities

available for the benefit of all the children in the school system without regard to race.

The School staff has been integrated. A Negro occupies the position of Assistant Superintendent of Schools. He is one of three Assistant Superintendents, all of whom have equal rank. The Coordinator of Secondary Education is a Negro as is the Supervisor of Special Education, the Mathematics Consultant, a coordinator in the Food Services Department and a member of the Special Services Department who devotes a large part of his time to the problem of proper boundary lines for attendance areas. There are eighteen Negro principals and thirty-eight white principals.[2] On the teaching staff, there are 798 Negro teachers, 833 white teachers and 3 orientals. All schools with the exception of one small elementary school have at least one Negro teacher on the staff. All but five of the forty-two schools have at least one white teacher.

Those in charge of the administration of the Gary schools have had a difficult problem for more than a decade in maintaining facilities for the rapidly expanding school population. Twenty-two new schools or additions have been built in the last ten years and class rooms have been more than doubled. A school corporation in Indiana is limited in its bonding power to two per cent of the assessed valuation of the property in the District. The Gary School City has been bonded to its limits for the past several years.

For the year 1962, payable in 1963, the property tax rate for the school district of Gary is $5.85 per $100 of assessed valuation. The District Judge noted that this was either the highest or one of the highest rates in the entire state of Indiana.

In addition to building new school buildings, the Board of Trustees and the School Administration have rented

[2] Assistant principals are included in these figures.

churches, storerooms, and utilized such buildings as armories and park buildings for the purpose of providing class rooms for children. Some schools have been operated on a two-shift basis. Roosevelt is predominantly a Negro school. It operates as a senior high school in the morning and as a junior high school in the afternoon. It should be noted that Wallace, an all white school, is operated in precisely the same manner.

Pursuant to the policy of transferring students from overcrowded schools, 123 students, 92 of whom are Negroes, were transferred from Tolleston, a predominantly Negro school to Mann, a predominantly white school. Eighty-seven Negro students were transferred from Tolleston to Edison, a predominantly white school. One hundred forty students of whom one hundred twenty are Negroes, were transferred from Froebel, a predominantly Negro school to Chase, a predominantly white school.

The transfer of students from one school to another is handled on an individual basis. There is no transfer as a matter of right from one school to the other. However, no racial characteristics are considered in allowing or disallowing a transfer.

The School Board has consistently followed the policy requiring students to attend the school designated to serve the district in which they live regardless of race. This was in accord with the Indiana statute which provides that all students in the public schools are to be admitted "* * * in the public or common school in their districts in which they reside without regard to race, creed or color, class or national origin * * *." § 28-5159 Burns Indiana Statutes.

Plaintiffs' position is grounded on their fundamental theory that their right to be integrated in school is such an over-riding purpose that little, if any, consideration need to be given to the safety of the children, convenience of pupils and their parents, and costs of the operation of the

school system. There was testimony that under plaintiffs' plan, at least six thousand pupils would have to be transported on each school day, presumably by bus, and that the cost of operating one bus was $20 per day.

The District Judge pointed out "The safety factors are difficult to solve in this school system. Three U. S. Highways and the Indiana Toll Road traverse Gary from East to West. At least nine railroads cross the city, mostly at grade, as they converge on Chicago from the east or southeast. Some of these railroads have multiple tracks through the city and the streets crossing them are several blocks apart in some areas. The Little Calumet River crosses the city from east to west and is infrequently bridged. These are all safety factors that have to be considered in locating schools and fixing attendance districts."

Let us consider Tolleston School in Gary. In the school year 1951-1952, this schol was in a predominantly white neighborhood, only 4.3% of its school-age children were colored. But, in the following ten years, colored people, on their own volition, moved in large numbers into this school district area. There was no change in the school district boundary lines. At the end of this period, the percentage of colored pupils was 76.65%. The plaintiffs claim that the voluntary Negro influx into this area has caused imbalance which defendants have the affirmative duty to change. In effect, plaintiffs say that defendants must somehow transplant from Tolleston enough Negro pupils to reduce their number to 50% of capacity, or some other arbitrary figure, and then, by some means, go out into the forty-two square miles of the City of Gary into the so-called white districts, and bring into the Tolleston School a sufficient number of white students to correct the imbalance.

Plaintiffs are unable to point to any court decision which has laid down the principle which justifies their claim that

there is an affirmative duty on the Gary School System to recast or realign school districts or areas for the purpose of mixing or blending Negroes and whites in a particular school.

Plaintiffs argue that Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, proclaims that segregated public education is incompatible with the requirements of the Fourteenth Amendment in a school system maintained pursuant to state law. However, the holding in Brown was that the forced segregation of children in public schools solely on the basis of race, denied the children of the minority group the equal protection of the laws granted by the Fourteenth Amendment.

[1] The situation in Brown is a far cry from the situation existing in Gary, Indiana. The School District boundaries in Gary were determined without any consideration of race or color. We agree with the argument of the defendants stated as "there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils."

After the original opinion in Brown v. Board of Education, supra, the Court set the case for further argument on the question of how its decision should be implemented. Thereafter, a three-judge district court was designated in Kansas to consider the Kansas aspects of the instructions in the Brown case. That Court stated, Brown v. Board of Education, D.C., 139 F.Supp. 468, 470, "Desegregation does not mean that there must be intermingling of the races in all school districts. 'It means only that they may not be prevented from intermingling or going to school together because of race or color."

In Briggs v. Elliott (EDSC), 132 F.Supp. 776, 777, the

Court said: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

We agree with and the record fully sustains the District Court's finding, "An examination of the school boundary lines in the light of the various factors involved such as density of population, distances that the students have to travel and the safety of the children, particularly in the lower grades, indicates that the areas have been reasonably arrived at and that the lines have not been drawn for the purpose of including or excluding children of certain races."

We approve also of the statement in the District Court's opinion, "Nevertheless, I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. * * *"

[2] We hold that the constitutional rights of the plaintiffs and others similarly situated, were not violated by the manner in which the defendant School District of Gary, Indiana maintained and operated its schools, and that the District Court was correct in dismissing the complaint herein.

Affirmed.

Ernest Leon DOWNS, minor, by his parents and next friends, Wallace Downs and Emma Downs, Preston E. Knox, minor, by his parents and next friends, Everett Knox and Annabelle Knox, Shirley Phillips, minor, by her parents and next friends, Lee Phillips, Sr., and Ernestine Phillips, Lorraine Jackson, minor, by her parents and next friends, Lefelt Jackson and Lenora Jackson, George L. Boyd, minor, by his father and next friend, Thomas A. Boyd, Willene Bill, minor, by her mother and next friend, Luella Bill, Ronald Stephenson, minor, by his mother and next friend, Creadale Stephenson, Billy C. Gatson, minor, by his parents and next friends, Carlston Gatson and Zella R. Gatson, Mary Frances Carter, minor, by her parents and next friends, Frances Pollard and John Pollard, Linda Stuart, minor, by her parents and next friends, Joseph Stuart and Marilouise Stuart, Dwight C. Hatchett, minor, by his parents and next friends, Earia Hatchett, Sr., and Ella Mae Hatchett, Marvin Jackson, minor, by his parents and next friends, Andrew D. Jackson and Ella Mae Jackson, Tommie Lee Benson, minor, by his mother and next friend, Louise Benson, Carolyn Jean Miles, minor, by her parents and next friends, Jim Miles and Cleo Miles, Luther W. Peghee, Jr., minor, by his parents and next friends, Luther W. Peghee, Sr., and Lizzie Peghee, Appellants,

v.

The BOARD OF EDUCATION OF KANSAS CITY, of the State of Kansas, a corporation, Ralph Fulton, Roy Edwards, Jr., Joe Vaughan, Ralph Evans, Robert Fothergill and Lee C. Berns, Members of the Board of Education of the City of Kansas City, of the State of Kansas, F. L. Schlagle, Superintendent, G. W. Corporon, and William W. Boone, Appellees.

No. 7536.

United States Court of Appeals
Tenth Circuit.

Sept. 25, 1964.

336 F.2d 988

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

HILL, Circuit Judge.

This class action was brought below by a group of Negro children, through their parents and next friends, to enjoin the appellee Board of Education from continuing certain alleged discriminatory practices in the administration of the Kansas City, Kansas, school system. The relief sought was granted in part and denied in part. The appeal is from that portion of the decree denying the class relief as sought.

Because of the broad attack made upon the administration of the school system, it is necessary to detail the evidence adduced at the trial below.

The public schools operated by the Board of Education of Kansas City, Kansas, consist of elementary, junior high and high schools as well as a junior college. The entire school system was operated on a segregated basis for many years prior to 1951. The pupils and faculty of each school were all of one race. In 1951 the Board merged the two previously segregated junior colleges into one integrated junior college. The two junior colleges had been located in the same buildings as the segregated high schools and each of them had its own faculty which reflected the racial composition of the student body. The teachers taught in both the high school and the junior college. After the two

junior colleges were merged into one junior college in a separate building, the faculty of the one integrated junior college became all white and the Negro teachers were retained but became full-time teachers in the segregated high school.

During the period from 1951 to 1954, the Board operated four high schools, six junior high schools and thirty-eight elementary schools on a segregated basis. Three of the high schools—Rosedale, Argentine and Wyandotte—were white and one high school—Sumner—was Negro. As to the six junior high schools, Rosedale, Argentine, Central, West and Northwest were composed of white students and Northeast was Negro. Seven of the thirty-eight elementary schools were Negro: Douglass, Grant, Stowe, Dunbar, Kealing, Attucks and Lincoln. The remaining thirty-one elementary schools, including Hawthorne, were white. Throughout this period of time, no Negro children attended Hawthorne Elementary School or Northwest Junior High School and no white children attended Northeast Junior High School. Again, the faculties of all of the schools reflected the racial composition of the respective student bodies.

On August 2, 1954, and subsequent to the decision in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Board initiated a policy whereby the school system was to be integrated "as rapidly as classroom space can be provided" and it empowered the Superintendent of Schools to implement that policy. In his reports to the Board on November 21, 1955, May 7, 1956 and March 3, 1958, the Superintendent recited that integration of the school system was accomplished in four steps. First; the merging and integration of the Junior College at the opening of school on September 10, 1951, prior to the decision in Brown and the resulting declaration of policy. Second; the estab-

lishment of tentative boundary lines between formerly Negro and formerly white segregated schools based upon geographic lines, and not race, which resulted in the integration of all kindergarten students; of all first grade students with the exception of those attending two named schools, where studies indicated that housing might not be available, of all 7th grade students in all of the junior high schools and of all 3 grades in all of the high schools. In addition, all of the grades in one elementary school were integrated. Students were permitted to attend the school located in the district in which they were a resident or had previously attended before the change in boundary lines so as to avoid unnecessary and undesirable psychological effects upon them. According to the November 21, 1955, report, this second step resulted in 232 Negro children attending schools which were formerly all white and, of this number, 165 students were in the elementary schools and 67 students were in the junior high and high schools. It also resulted in the attendance of Negro children at 16 of the 30 elementary schools that were formerly all white and in all 5 of the junior high and high schools that were formerly all white. These results were accomplished by the opening of school in September, 1954. Third; by the opening of school in September, 1955, all of the elementary grades were integrated in all of the elementary schools except one, where housing was inadequate, and all of the grades of all of the junior high schools were integrated. The total number of elementary schools having no Negro students dropped from 14 to 11, even though 2 new schools were opened in areas having no Negro residents, and the number of Negro students attending formerly white schools in the elementary and secondary grades increased from 232 to 619. The number of Negro students from kindergarten through Junior College attending formerly white segregated schools increased from 302 in September, 1954,

to 703 in September, 1955, and one white student attended the formerly all Negro high school, Sumner. It was noted that, as integration proceeded, further adjustments in the boundary lines of the schools would be almost inevitable because of housing accommodations. Fourth; by the opening of school in September, 1956, the school district boundary lines were defined, all students were required to attend the school of the district in which they resided, unless granted a permit to attend elsewhere, and permits were issued to students who desired to continue attendance at Summer High School, regardless of where they resided. In addition, the greater part of the bus transportation was discontinued.

The school system operates on what is known as the "neighborhood school policy" and the "feeder school policy." Under the neighborhood school policy, boundary lines for a school attendance district are established as nearly as possible in the area surrounding the school and it takes into consideration such factors as school capacity, number of students, natural barriers, such as rivers and railroad lines, and the possibility of increase or decrease in population. Any student living within the boundaries of that school district may attend the school as a matter of right and ordinarily is required to do so. The feeder school policy means that all of the students who graduate from a given elementary school must attend the same designated junior high school and all of the students who graduate from a given junior high schol must attend the same designated senior high school.

The junior high schools involved in this litigation are West, Northwest and Northeast. They are located on an east-west line in the north part of the city. The Hawthorne Elementary School is directly involved in this litigation. Its boundary lines were established by the Board on August 5 1957, for the school year of 1957-1958 and were to remain

in effect until changed. Prior to 1960, Hawthorne was a predominantly white school and was staffed by white personnel. Under the "feeder" system students graduating from Hawthorne were required to attend Northwest Junior High School and, thereafter, Wyandotte High School, both of which were and are predominantly white schools.

In about 1956, the city commenced two slum clearance projects covering areas in which almost all of the residents were Negroes. Consequently, under the neighborhood school policy most of the elementary schools located in those areas were attended by Negro children and under the feeder school policy most of these students were required to attend Northeast Junior High School upon graduation from elementary school. As a result of the two projects, large numbers of Negro families were forced to move and many of them purchased homes in the attendance district of Hawthorne Elementary School, mainly between 9th and 13th Streets. Thus, by 1960 a majority of those residing in the Hawthorne district were Negroes, with the heaviest concentration being east of 13th Street. In September, 1960, only 4 Negro families lived west of 13th Street but by January, 1962, that number had increased to 50 or 55 families. Accordingly, at the time of trial in 1962, Hawthorne had changed from a so-called white school to a predominantly Negro school and the faculty became all Negro rather than white.

The Superintendent of Schools testified that, as a result of the shift in population caused by the two projects, studies and surveys were made in September, 1959, of the Northwest, Northeast and Hawthorne areas and it appeared that there was a possibility that Northwest Junior High School would become overloaded and overcrowded and half-day sessions might be required in that school. It was also anticipated that there would be vacant classrooms at Northeast Junior High School. The Superintendent

further testified that changes were made in the attendance boundary lines for Northwest and Northeast in order "to equalize the student load in the two buildings." The minutes of the Board meeting of August 22, 1960, show that the attendance district of Hawthorne Elementary School was divided and the students graduating from that school who resided east of 13th Street, which includes the appellants, were assigned to Northeast Junior High School. Prior to that time, all students graduating from Hawthorne were, under the feeder system, assigned to Northwest. It is this change in the Hawthorne attendance district, which required the appellant children to attend Northeast rather than Northwest, that gave rise to this litigation.

The record shows that the student seating capacity at Northwest Junior High School in the school year of 1960-1961 was 1,367 and at Northeast it was 1,217. The student enrollment at Northwest during the school year of 1959-1960, prior to the changes in boundary lines, was 1,129 and at Northeast it was 923. After the change in boundary lines and during the school year of 1960-1961, the student enrollment was 1,176 at Northwest and 1,006 at Northeast. Both of these figures are below the student capacity of the respective schools but the Superintendent testified that "* * * educationally, you cannot put in more than about 85 to 87 percent of the total seating capacity in a building and enroll them because not all subjects are enrolled in equally, so, when you reach within 13 to 15 percent of the maximum seating capacity of a building, you are destroying the educational opportunities." Had the boundary line not been changed, the enrollment would have been 1,250 at Northwest and 932 at Northeast.

At the same Board meeting in which the boundary line changes were made, the Board adopted a policy of granting permits for students from the Hawthorne District east of 13th Street, who had attended Northwest the previous year,

to continue at that school. It also specifically adopted a policy, which had been in effect prior to that time, of granting permits to students enabling them to transfer from a school "where the majority of the students are of a different race", when the students requested such a transfer.

The evidence indicates that the division of the Hawthorne district whereby the students residing east of 13th Street were required to attend Northeast rather than Northwest, was not publicized to any great extent and that the appellants experienced some difficulty in ascertaining the basis for the change. The appellant parents met on different occasions with the Assistant Superintendent of Schools, the Board and the Superintendent. They were ultimately advised of the change in boundary lines and the children were all denied enrollment at Northwest Junior High School for the school years of 1960-1961 and 1961-1962. Testimony was also presented on behalf of appellants to the effect that for the school years of 1960-1961 and 1961-1962 some of the children in the same family were required to attend Northeast while some of them were attending Northwest and that the distance from their homes to Northeast was appreciably greater than the distance to Northwest.

It should be pointed out, however, that the appellees presented evidence to the effect that under the Board's rules the maximum distance a student could live from a school and still attend that school was about 1.5 miles and this is the generally accepted maximum distance. Evidence was also presented to the effect that while school boundary lines, prior to 1954, were drawn on the basis of race, such lines were thereafter established upon the basis of geography, i.e., school capacity and number of children living within a prescribed area surrounding a school, and that

the change in boundary line on August 22, 1960, was made without knowledge of the number of white and Negro students to be affected and without race in mind.

The record discloses that, as of the time of trial below, the student bodies of Attucks, Douglass, Dunbar, Grant, Kealing and Stowe Elementary Schools were all, or predominantly, Negro children and that while Lincoln Elementary School had been discontinued, Hawthorne Elementary School had become a predominantly Negro school. Northeast Junior High School and Sumner High School were, at that time, virtually 100 percent Negro and all of these schools were staffed by Negro personnel. The record also discloses that, as of April 13, 1962, the racial composition of the student bodies at the Junior College and the remaining junior and senior high schools was as set forth in the margin.[1] As of the same date, only 11 of the elementary schools had an all white student body and out of a total enrollment of 7,257 in the remaining 20 elementary schools, there were 1,360 Negro children in attendance.

The trial court resolved the controversy over the pupil transfer policy in favor of the plaintiffs-appellants and held it to be unconstitutional. No appeal was taken from that part of the decree. But, with that exception, the lower court approved the overall policy of the Board and, in denying the injunction, found and held that: In relocating the boundary in the Hawthorne district for the purpose of establishing the boundaries of the Northwest

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[1]

| School | White | Negro |
|---|---|---|
| Junior College | 465 | 94 |
| Argentine | 997 | 124 |
| Rosedale | 912 | 134 |
| Wyandotte | 1749 | 117 |
| Central Junior High | 990 | 67 |
| Northwest Junior High | 878 | 239 |
| West Junior High | 601 | 21 |

and Northeast Junior High Schools, the Board "acted in good faith and for the purpose of balancing the enrollment of the two schools involved"; relocation of attendance district boundaries for the Kansas City public schools was made "on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate"; each child would attend the school within the district of his residence, without regard to race; and the overall policy of the Board met "the tests set forth in Brown v. Board of Education, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083], and, with the exception of the transfer policy herein referred to, has served to effectuate a racially non-discriminatory school system." It is from this portion of the decree that this appeal was taken.

Appellants contend here, as they did in the court below, that the Board's policy evinces a clear pattern of the deliberate use of zone lines and assignment regulations to insure the continued operation of a segregated school system. To support this contention, they point out the following factors: The fact that seven of the elementary schools are still composed of predominantly Negro students and eleven are composed of all white students; the Northeast Junior High and the Sumner High schools are still virtually 100 percent Negro; the boundary lines for Northwest and Northeast Junior High Schools were so changed in the Hawthorne district as to require the majority of the Negro children residing in that district to attend the Negro schools of Northeast and, thereafter, Sumner; the fact that Negro schools are staffed by Negro personnel and white schools with only white personnel; and the transfer system whereby children were permitted to transfer out of their normal school district when the majority of the students in that school were of a different race. The appellants also

attempted to demonstrate by use of the 1962 census figures that a great majority of Negro students still attend Negro schools but that is not helpful because those figures are confined to the number of children residing in the City of Kansas City and the boundary lines for the Board of Education are not identical with the city boundary lines.

[1-4] The starting point in any school segregation case is the basic principle that state-imposed racial segregation in the public schools is unconstitutional and prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Goss v. Board of Education, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; Brown v. Board of Education, supra. The right of a student not to be discriminated against or segregated on racial grounds in the public schools is so fundamental that it is embraced in the concept of due process of law under the Fifth Amendment. Cooper v. Aaron, supra; Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884. This principle is the supreme law of the land, Cooper v. Aaron, supra, and all provisions of federal, state and local law requiring or permitting such segregation or discrimination must yield to it, Brown v. Board of Education, supra, 349 U.S. at 298, 75 S.Ct. 753. The burden of initiating desegregation in the public schools rests upon the school authorities, who have the primary responsibility for assessing and solving the varied local school problems arising as a result of implementing the decision in Brown, supra, and the courts must determine whether the action of the school authorities constitutes good faith implementation of those constitutional rights. Cooper v. Aaron, supra; Brown v. Board of Education, supra, 349 U.S. at 299, 75 S.Ct. 753. There cannot be full compliance with these constitutional requirements until all dual school systems based upon race

or color have been elminated. Ross v. Dyer, 5 Cir., 312 F.2d 191; Augustus v. Board of Public Instruction, 5 Cir., 306 F.2d 862.

[5-8] The Supreme Court in Cooper v. Aaron, supra, held that the Fourteenth Amendment prohibitions against racial discrimination in the public schools "* * * extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action * * * or whatever the guise in which it is taken * * *" and that the constitutional right of a student not to be discriminated against in the public schools on grounds of race or color "* * * can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously' * * *." (358 U.S. at 17, 78 S.Ct. at 1409) Thus, it has been held that a transfer plan or policy, such as the one adopted by the Board in this case, whereby a student might transfer out of a desegregated school if a majority of the students in that school are of a different race than the student seeking such transfer, is invalid. Goss v. Board of Education, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Mapp v. Board of Education of City of Chattanooga, 6 Cir., 319 F.2d 571; Brooks v. County School Board of Arlington County, Virginia, 4 Cir., 324 F.2d 303. The application of such criteria as overcrowding in the school rooms to one race and not to another so as to bar the assignment of certain students to a particular school is prohibited, Marsh v. County School Board of Roanoke County, Virginia, 4 Cir., 305 F.2d 94, as is the intentional gerrymandering of school attendance district lines so as to confine one race to attendance at a particular school, Taylor v. Board of Education of City School District of New Rochelle, 2 Cir., 294 F.2d 36, cert.

denied, 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339. Finally, the maintenance of a discriminatory "feeder" system, whereby pupils assigned initially to a Negro school were routinely promoted to Negro schools and, in order to transfer to white schools, they were required to meet criteria to which white students of the same scholastic aptitude would not be subjected, does not comport with constitutional principles. Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F.2d 429.

The neighborhood school system and other school systems, by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. They have been successfully challenged on constitutional grounds where operated in such a way as to discriminate against students because of their race or color. E.G., Norwood v. Tucker, 8 Cir., 287 F.2d 798; Northcross v. Board of Education of City of Memphis, 6 Cir., 302 F.2d 818, cert. denied, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810; Green v. School Board of City of Roanoke, Virginia, 4 Cir., 304 F.2d 118; Dodson v. School Board of City of Charlottesville, 4 Cir., 289 F.2d 439; Jones v. School Board of City of Alexandria, Virginia, 4 Cir., 278 F.2d 72. On the other hand, these same cases recognize the principle that in the absence of a showing that such school systems are being used to deprive a student of his constitutional rights, they are not objectionable on constitutional grounds.[2] In the second Brown case, supra, the Supreme Court appears to have recognized that school admissions may be based upon such factors as residence. It said that in determining "good faith compliance at the earliest practicable date", the low-

[2] See also Shuttelsworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D.Ala.1958), aff'd, 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed. 2d 145.

er courts might take into account problems arising from the "* * * revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis * * *." (349 U.S. at 300 and 301, 75 S.Ct. at 756) The Sixth Circuit has said: "Minimal requirements for nonracial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. * * *" Northcross v. Board of Education of City of Memphis, supra, 302 F.2d at 823.

There is, to be sure, a racial imbalance in the public schools of Kansas City. The record shows that, as of April 13, 1962, there was a total of 7,467 Negro children in the elementary, junior high and senior high schools. Almost 73 percent of these children, or 5,405, attended the nine schools which were predominantly Negro. The remaining 27 percent, or 2,062 children, attended 26 integrated schools. Of course, the schools located the nearest to the concentration of Negro population had the highest percentage of Negro pupils and the schools the greatest distance away from that concentration were composed entirely of white students. Thus, while there were some schools having an all Negro student body and some having an all white student body, there were also 26 of the Kansas City schools that had both Negro and white students. Appellants' assertion that the racial composition of Wyandotte High School and Northwest Junior High School "is consistent with their pre-1954 character" has no support in the evidence, which shows that these schools were all white prior to 1954 and, after 1954, there were 117 Negro students in attendance at Wyandotte and 239 at Northwest. The evidence clearly shows that at least some Negro students were in attendance at each and every

one of the junior high and senior high schools in the Kansas City school system. And, the Superintendent of Schools testified that the school attendance districts were laid out without regard to race and upon the basis of geography, school capacity and number of children residing in the district. There is therefore no basis in fact for the appellants' contention that the evidence establishes "a clear pattern of deliberate use of zone lines and assignment regulations to insure the continued operation of a dual school system." All of the evidence is to the contrary and the trial court so found saying that the boundary lines after 1954 "were set on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate."

[9, 10] It is true that the boundary line in the Hawthorne Elementary School district was changed so as to require the attendance at Northeast Junior High School of all students residing east of 13th Street and that the effect of such change was to require many Negro children, including appellants, to attend the predominantly Negro junior high school, Northeast, rather than Northwest, an integrated school. Of course, we agree with the appellants that the school authorities cannot, under applicable constitutional standards heretofore discussed, use such a change in boundary lines or the neighborhood school system as a guise for the purpose of perpetuating racial segregation. The trouble is that there is no evidence to show that the boundary line was changed for that purpose. Rather, the trial court, after hearing and observing the witnesses, found that the school authorities "acted in good faith and for the purpose of balancing the enrollment of the two schools involved." That finding is supported by the evidence which shows that, as a result of slum clearance projects, there was a general shift in the city's population in a west-

erly direction. This brought about the relocation of many Negro families to the Hawthorne area. The Superintendent of Schools testified that the change in boundary line was directly attributable to this shift in population and was made without knowledge of the number of white and Negro children to be affected and without race in mind. He also testified that it was made to alleviate overcrowded conditions at Northwest, which was in danger of having to go on half-day sessions. In addition, the record discloses that in 1956 Parker Elementary School district was divided so as to change some students to West Junior High School from Northwest and as the trial court said: "* * * There is no more reason to believe that the division of Hawthorne district in 1960 was based on any other considerations than those which prompted the division of Parker district in 1956, i. e., to achieve an adjustment of the pupil load between junior high school districts. * * *" The drawing of school zone lines is a discretionary function of a school board and will be reviewed only to determine whether the school board acted arbitrarily. Northcross v. Board of Education of City of Memphis, 6 Cir., 333 F.2d 661. There is no showing that the Board acted arbitrarily in this case.

It is also true that the staffs of the various schools are either all white, as is the case in white and integrated schools, or all Negro. But, the appellants do not, by their complaint or evidence, seek to have these staffs desegregated. Furthermore, they have not cited and we have not found any case holding that such a policy, in and of itself, is sufficient to establish a discriminatory intent on the part of the Board.

The pupil transfer policy adopted by the Board was held by the lower court to be violative of the Fourteenth Amendment and therefore invalid under the rule announced in

Goss v. Board of Education, supra. While no appeal from this ruling was taken, the existence of that policy is relied upon by appellants as indicative of the overall intent of the Board. But, it must be remembered that during the entire period it was in effect, identical systems had been held to be legal and proper when applied equally to Negro and white students, as is the situation in this case. Goss v. Board of Education of City of Knoxville, 6 Cir., 301 F.2d 164, reversed 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed 2d 632; Kelley v. Board of Education of City of Nashville, 6 Cir., 270 F.2d 209, cert. denied, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240; Dodson v. School Board of City of Charlottesville, 4 Cir., 289 F.2d 439. The use of such a policy therefore has no bearing upon the Board's intent.

[11] It follows from what has been said that none of the factors relied upon by appellants, when considered alone, is sufficient to establish a denial of their constitutional right not to be discriminated against because of race or color. The crucial question, however, is whether all of these factors considered together are sufficient. In this connection the trial court made a negative finding to the effect that there was no evidence to show that the appellees were not carrying out the integration policy set forth in the Superintendent's reports of November 21, 1955, May 7, 1956, and March 3, 1958. The court also found and held that "* * * the overall policy of the Board of Education of Kansas City, Kansas meets the tests set forth in Brown v. Board of Education, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083], and, with the exception of the transfer policy herein referred to, has served to effectuate a racially non-discriminatory school system." The question is one of fact and, dealing as it does with the good faith intentions of the school authorities, it is peculiarly in the province of the trial judge who had the opportunity to hear and observe the

witnesses. Under these circumstances, we should be, and are, most reluctant to overturn his findings and conclusions unless convinced that they are clearly erroneous. We are not so convinced on this record. Certainly, there is no evidence of intentional gerrymandering of the school attendance districts, of the use of a dual school system, of the assignment of pupils according to racial factors or of any of the other "schemes" and "devices" condemned in the cases discussed above. In our opinion, the Kansas City school system meets the "minimal requirements for non-racial schools" of "geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right."

[12] Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention,[3] the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. Kelley v. Board of Education of City of Nashville, supra; Stell v. Savannah-Chatham County Board of Education, 5 Cir., 333 F.2d 55; Evers v. Jackson

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[3] See Evans v. Ennis, 3 Cir., 281 F.2d 385, 389, cert. denied, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365; Taylor v. Board of Education of City School District, D.C., 191 F.Supp. 181 and 195 F.Supp. 231, aff'd, 2 Cir., 294 F.2d 36, cert. denied, 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339; Blocker v. Board of Education of Manhasset, New York, 226 F.Supp. 208 (E.D.N.Y.1964); Branche v. Board of Education of Town of Hempstead, 204 F.Supp. 150 (E.D.N.Y.1962); Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878.

Municipal Separate School District, 5 Cir., 328 F.2d 408; Boson v. Rippy, 5 Cir., 285 F.2d 43; Holland v. Board of Public Instruction, 5 Cir., 258 F.2d 730; Avery v. Wichita Falls Independent School District, 5 Cir., 241 F.2d 230, cert. denied, 353 U.S. 938, 77 S.Ct. 816, 1 L.Ed.2d 761; Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F.2d 429; Jeffers v. Whitley, 4 Cir., 309 F.2d 621.[4]

Moreover, the question was conclusively answered in Bell v. School City of Gary, Indiana, 7 Cir., 324 F.2d 209, 213, cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216, where the court held that "* * * 'there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.' "

[13] We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation.

The judgment is affirmed.

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[4] In Brown v. Board of Education, 139 F.Supp. 468, 470 (D.Kan. 1955) the three-judge court, after remand from the Supreme Court, said:

> "* * * Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."